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No. 91-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMODITIES EXPORT CO.,
Petitioner,

V

U.S. CUSTOMS SERVICE,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

In its second review of an action by Commodities Export Co. ("Commodities") against Customs, the Sixth Circuit:

1. Vacated the decision of the US District Court in Detroit, entered on remand, that Customs did not violate Commodities' due process rights;

2. Again remanded this case to the US District Court in Detroit, but this time -

3. Ordered the US District Court in Detroit to transfer Commodities' action against Customs to the Court of International Trade ("CIT").

In ordering this case transferred to the CIT, did the Sixth Circuit foreclose Commodities' due process rights because (a) the statutes governing the CIT's jurisdiction are *party specific* and afford no access to Commodities and (b) all of the CIT's jurisdictional statutes are based on importation or an import transaction and duty-free stores like Commodities operate exclusively in export?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION:
PETITION FOR WRIT OF CERTIORARI 2

CONSTITUTIONAL PROVISION
AND STATUTES INVOLVED 2

I. STATEMENT OF THE CASE 4

II. JURISDICTION 7

III. ARGUMENT:
Why writ of certiorari should issue. 10
A. The Sixth Circuit relied on the wrong statute: 28 USC 1582. 10
B. Commodities still has no access to the CIT under 28 USC 1581. 11
C. CIT jurisdiction is premised upon importation or an import transaction. Duty-free stores operate exclusively in export. 14
D. Conflict between Fourth and Sixth Circuits. 17

CONCLUSION 20

APPENDIX

Commodities Export Co v US Customs Service, 957 F2d 223 (6th Cir 1992), Second Opinion of Sixth Circuit in this case which is the subject matter of this Petition for Writ of Certiorari A1

Commodities Export Co v US Customs Service, 888 F2d 431 (6th Cir 1989), First Opinion of the Sixth Circuit in this case A20

US v Commodities Export Co, 733 F Supp 109 (CIT 1990), Opinion of the CIT relevant to this case A39

Sixth Circuit Order of March 30, 1992 Denying Rehearing as to its Second Opinion in this case .. A53

19 USC 1514, Protest against decision of appropriate customs officer A54

19 USC 1515, Review of protests; administrative review and modification of decisions; request for accelerated disposition of protest A57

19 USC 1555, Bonded warehouses A58

28 USC 1581, Civil actions against the United States and agencies and officers thereof A64

28 USC 1582, Civil actions commenced by the United States A67

19 CFR 174.11, Matters subject to protest A67

19 CFR 174.12, Filing of protests A68

TABLE OF AUTHORITIES

Cases

Commodities Export Co v US Customs Service,
888 F2d 431 (6th Cir 1989) 2, 4, 6, 11, 13

Commodities Export Co v US Customs Service,
957 F2d 223 (6th Cir 1992) . . . . . i, 1, 2, 4, 7, 20

Demarest v Manspeaker, 112 L Ed 2d 608 (1991) 9

Halperin Shipping Co Inc v US, 742 F Supp 1163
(CIT 1990) 12

Hostetter v Idlewild Bon Voyage Liquor Corp,
377 US 324, 84 S Ct 1293 (1964) 16

K-Mart Corp v Cartier, Inc, 485 US 176 (1988) . . 18, 19

RJ Reynolds Tobacco Co v Durham County,
479 US 130 (1986) 15

Stone & Downer et al v US, 19 CCPA 259 (1931) . 15, 16

Trayco, Inc v US, _____ F2d _____ (4th Cir 1992),
1992 US App LEXIS 3445,
4th Cir Slip Op 91-2555 (March 2, 1992) 17, 19

US v Commodities Export Co, 733 F Supp 109
(CIT 1990) 2, 5, 7, 10, 11, 15, 16

US v Commodities Export Co, 755 F Supp 418
(CIT 1991) 9

US v Toshoku America, Inc, 879 F2d 815
(Fed Cir 1989) 12

US v Utex Intern Inc, 857 F2d 1408 (Fed Cir 1988) . . 12

Xerox Corp v County of Harris, 459 US 145 (1982) . . 15

US Constitution

Fifth Amendment 2, 11

Statutes

5 USC 552, Freedom of Information Act 6
19 USC 1304 . . . . . 17, 18
19 USC 1514 12
19 USC 1514(a)(3) 12
19 USC 1515 3
19 USC 1515(a) 12
19 USC 1555(a) 14, 15
19 USC 1555(b) 14
19 USC 1555(b)(3)(F)(ii)(I) 6
19 USC 1604 18
19 USC 1621 13
19 USC 1623(b)(1) 8, 9
28 USC 1254(1) 2
28 USC 1346(a)(2), the Tucker Act 17
28 USC 1352 . . . . . 7, 8
28 USC 1355 . . . . . 7, 8, 17
28 USC 1581 . . . . . 8, 10, 11, 13, 14, 17, 18
28 USC 1581(a) 2, 11-13
28 USC 1581(i) 3, 13
28 USC 1582 . . . . . 8, 10, 11, 14, 18
28 USC 1582(1) 18, 19
28 USC 1582(2) 3, 10, 11, 14, 15, 19
28 USC 1583 18
28 USC 1631 . . . . . 4, 10
28 USC 2415 13

Customs Regulations

19 CFR 113.2(a) 9
19 CFR 174 12
19 CFR 174.11(c) 12

Supreme Court Rules

13.1 2
13.4 2
14.1(i) 7
14.1(k)(iv) 2
30.1 2

Other Authority

4 US Code Congressional & Administrative News (96th Congress, 2nd Session, 1980), Legislative History, Customs Courts Acts of 1980 14
H. Rep. No. 96-1235, 96th Cong., 2d Sess. 20, reprinted in 1980 U.S.C.C.A.N. 19

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COMMODITIES EXPORT CO.,

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U.S. CUSTOMS SERVICE,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Commodities Export Co.[1] requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered on February 19, 1992 (its second opinion in this case).

OPINIONS BELOW

The second opinion (A1-19)[2] of the United States Court of Appeals for the Sixth Circuit in this case is reported at 957

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[1]Commodities Export Co., a duty-free store, is a Michigan Corporation. It has no parent or subsidiary company.

[2]References to page numbers of the Appendix are preceded by "A" followed by the page numbers. Thus, "A1-19" is a reference to pages 1 through 19 of the Appendix.

F2d 223 (6th Cir 1992). The first opinion (A20-38) of the Sixth Circuit in this case is reported at 888 F2d 431 (6th Cir 1989). The relevant opinion (A39-52) of the United States Court of International Trade is reported at 733 F Supp 109 (CIT 1990).

JURISDICTION: PETITION FOR WRIT OF CERTIORARI

The second opinion (A1-19) and judgment[3] of the Sixth Circuit were entered on February 19, 1992. A timely petition for rehearing *en banc* was filed on March 2, 1992 and denied (A53) on March 30, 1992. Under SCR's 13.1,.4 and 30.1, the 90 days to file a timely petition for writ of certiorari expires on Monday, June 29, 1992, the next day on which the federal courts are open for business. The Supreme Court's jurisdiction is based upon 28 USC 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be ... deprived of life, liberty, or property without due process of law....

28 USC 1581(a) provides:

> **§ 1581. Civil actions against the United States and agencies and officers thereof**
>
> **(a)** The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the

[3]Judgment not included in Appendix because entered same date as opinion, February 19, 1992. SCR 14.1(k)(iv).

denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [19 USC 1515].

28 USC 1581(i) provides:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for -
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration or enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section....

28 USC 1582(2) provides:

> **§ 1582. Civil actions commenced by the United States**
>
> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States - ...
>
> (2) to recover upon a bond relating to the importation

of merchandise required by the laws of the United States or by the Secretary of the Treasury; or....

I. STATEMENT OF THE CASE

The Sixth Circuit vacated the decision of the US District Court in Detroit entered upon remand that Customs did not violate petitioner Commodities Export Co.'s ("Commodities") due process rights[4] and remanded this case to that court with instructions to transfer Commodities' action to the United States Court of International Trade ("CIT") pursuant to 28 USC 1631.[5] This is the Sixth Circuit's second opinion (A1-19) in this case. Commodities seeks review of this second opinion (A1-19) before this Court by writ of certiorari.

The purpose of vacating the District Court's judgment was to afford Commodities a trial on the merits. However, in transferring this case to the CIT (instead of remanding it to the District Court from which it came), the Sixth Circuit created an impossibility: (a) no jurisdictional statute gives Commodities access to the CIT in this case and (b) all CIT jurisdiction is premised on importation or an import transac-

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[4]Commodities' due process claims are summarized in the Sixth Circuit's first (A20-38) and second (A1-19) opinions.

[5]28 USC 1631 states:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal *to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.* (Emphasis added.)

tion. Duty-free stores operate only in export.

Commodities is a duty-free store located near the entrance of the Ambassador Bridge in Detroit, Michigan. The bridge connects Detroit with Windsor, Ontario, Canada.

Duty-free stores *temporarily* store both foreign and domestic goods in US Customs Service ("Customs") bonded warehouses pending their withdrawal and sale to travelers who immediately depart the US with these goods in their possession. Thus, the goods are exported from the US tax- and duty-free.

Customs and the CIT's position (A39-52) is that the foreign goods sold by Commodities are "imported" into the US the instant they enter US jurisdiction. Thus, duty-free stores import to export.

Commodities' view is that there can be no importation into the US unless the foreign goods are withdrawn from the duty-free store's bonded warehouse and actually injected into the US stream of commerce. The mere border crossing followed by *temporary* storage[6] of foreign goods in a duty-free store's bonded warehouses pending their immediate exportation from the US in the hands of duty-free store customers is not importation.

Moreover, the domestic goods stored in a duty-free store's bonded warehouse can never be "imported" into the US.

Commodities opened for business on July 14, 1976 and made deliveries of tax- and duty-free goods to its customers *before* the border exit point. Shortly, thereafter Customs announced a policy that all duty-free stores must deliver tax-

[6]This storage is under lock and key, under bond, fully documented, and with the full knowledge and approval of Customs.

and duty-free goods at or beyond the border exit point[7] and attempted to enforce that policy against Commodities.

Commodities promptly sought and obtained a permanent injunction against Customs in the US District Court in Detroit barring the implementation of this policy and preserving Commodities' existence as a duty-free store in its present form.[8] This injunction has been a source of rancor between the parties.

Customs supervises bonded warehouses primarily by assessing liquidated damages against the warehouse proprietor's bond for alleged infractions of the bond's terms.

Since 1983, Customs has assessed over $1 million dollars in liquidated damages against Commodities. To each assessment, Commodities filed timely, lengthy, written objections and petitions for relief demanding due process hearings and records under the Freedom of Information Act. Commodities' petitions were ignored by Customs.

In February, 1988, Customs without reference to any court, gave Commodities an ultimatum: pay or shut down within 30 days.

On March 29, 1988, Commodities filed a Petition for Supplemental Relief before the same Detroit District Court which had granted the permanent injunction. This petition was dismissed for lack of subject matter jurisdiction on August 31, 1988. Commodities then appealed to the Sixth Circuit which vacated and remanded in its first opinion (A20-

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[7]Effective September 7, 1988, this policy is now law: 19 USC 1555(b)(3)(F)(ii)(I). (A61.)

[8]Customs never challenged the District Court's subject matter jurisdiction to grant this permanent injunction.

38).

During the pendency of the Sixth Circuit appeal, Customs took one of the liquidated damage assessments and sued Commodities and its surety in the CIT. This action resulted in the CIT's jurisdictional decision (A39-52).[9]

On remand, on November 13, 1990, the Detroit District Court again dismissed Commodities' Amended Petition for Supplemental Relief for lack of subject matter jurisdiction relying on the CIT's jurisdictional ruling (A39-52).

Commodities again appealed to the Sixth Circuit which issued its second opinion (A1-19) on February 19, 1992 which vacated the judgment of the Detroit District Court and ordered that court to transfer this case to the CIT. Commodities contests this order that this matter be transferred to the CIT by seeking review in this Court by this petition for writ of certiorari. Commodities submits that the Sixth Circuit should have remanded this case to the Detroit District Court with instructions to proceed with a trial on the merits of Commodities' Amended Petition for Supplemental Relief instead of transferring this case to the CIT.

II. JURISDICTION

Pursuant to SCR 14.1(i), Commodities submits that the court of first instance in this case, to wit, the US District Court in Detroit has subject matter jurisdiction over Commodities' Amended Petition for Supplemental Relief under 28 USC 1352 and 28 USC 1355 which state:

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[9]The Government obtained a judgment against Commodities and its surety, Old Republic Insurance Co., in this case on May 14, 1991. This judgment and the CIT's rulings on jurisdiction, statutes of limitations, etc., are currently on appeal to the United States Court of Appeals for the Federal Circuit in Case No.'s 91-1470 & 91-1482.

§ 1352. Bonds executed under federal law

The district courts shall have original jurisdiction, concurrent with state courts, of any action on a bond executed under any law of the United States, except matters within the jurisdiction of the Court of International Trade under section 1582 [28 USC 1582] of this title.

§ 1355. Fine, penalty or forfeiture

The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 [28 USC 1582] of this title.

28 USC 1581 ([A64-66] by which a non Government party may sue the Government in the CIT) is not an exception to this district court jurisdiction. Also, 28 USC 1352 and 28 USC 1355, unlike the CIT's jurisdictional statutes, 28 USC 1581 and 28 USC 1582, are *not party specific*.

Liquidated damages are *penalties*.

19 USC 1623(b)(1):

(b) Whenever a bond is required or authorized by a law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce, the Secretary of the Treasury may-

(1) Except as otherwise specifically provided by law, prescribe the conditions and form of such bond, and fix the amount of *penalty* thereof, whether for the payment of *liquidated damages* or of a penal sum:.... (Emphasis

added.)

Also, 19 CFR 113.2(a):

> Whenever a bond is required or authorized by law, regulation, or instruction, the Commissioner of Customs may:
>
> (a) Prescribe the conditions and form of the bond and fix the amount of *penalty,* whether for the payment of *liquidated damages,* or of a penal sum, except as otherwise specifically provided by law. (Emphasis added.)[10]

The core issue in this case is subject matter jurisdiction. By transferring this case to the CIT instead of remanding it to the Detroit District Court from which it came with instructions to proceed with a trial on the merits, the Sixth Circuit

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[10]The CIT disagreed in *US v Commodities Export Co,* 755 F Supp 418, 420-21 (CIT 1991). The CIT claimed that liquidated damages were not penalties because (1) 19 USC 1623(b)(1) and 19 CFR 113.2(a) are not "definitional" and (2) that liquidated damages are not penalties if they are "'reasonable'" and "'the exact amount of damages sustained would be difficult to prove.'" (Citations omitted.)

19 USC 1623(b)(1) and 19 CFR 113.2(a) clearly and unequivocally *define* bond liquidated damages as *penalties.* If they are not that under this authority, then what are they?

The CIT's use of case authority to deny that bond liquidated damages are penalties is legally and logically untenable: none of the case authority addressed or confronted the definitions found in 19 USC 1623(b)(1) and 19 CFR 113.2(a). Such case authority cannot be used to overrule the unambiguous language of 19 USC 1623(b)(1) and 19 CFR 113.2(a). As this Court observed in *Demarest v Manspeaker,* 112 L Ed 2d 608, 616 (1991): "When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."

The CIT's ruling is presently on appeal to the US Court of Appeals for the Federal Circuit in Case No.'s 91-1470 & 91-1482.

has created a procedural impossibility requiring the intervention of this Court. Duty-free stores have no access to the CIT in their own right and the CIT lacks subject matter jurisdiction to adjudicate anything related to duty-free stores since they are exporters.

III. ARGUMENT:
Why writ of certiorari should issue.

A. The Sixth Circuit relied on the wrong statute: 28 USC 1582.

The CIT's jurisdictional statutes are unique in that they are *party specific*. Under 28 USC 1581 (A64-66), only a party other than the Government may be plaintiff. Under 28 USC 1582 (A67), only the Government may be plaintiff. The subject matter encompassed by 28 USC 1581 (A64-66) is markedly different from that of 28 USC 1582 (A67).

The Sixth Circuit's decision (A1-19) on appeal here is based on the CIT's jurisdictional ruling of March 14, 1990 (A39-52) over one of the claims raised by Commodities in its District Court action. The Sixth Circuit gave *res judicata* effect to this CIT ruling (A39-52) which is based entirely on 28 USC 1582(2) wherein the Government was the plaintiff.

Commodities has no access to the CIT in its own right under 28 USC 1582.[11]

The Sixth Circuit ordered this case transferred to the CIT under 28 USC 1631 (*supra*, p 4). Although 1631 permits

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[11]Both the Government and the District Court contended that all of Commodities' due process rights were satisfied when the Government sued Commodities in the CIT under 28 USC 1582(2). This contention, which would have barred and precluded Commodities from obtaining judicial review of the Government's conduct in its own right, was never accepted by the Sixth Circuit.

such a transfer, it does not (nor does any other authority) permit any court to rearrange the parties. Commodities will still be the *plaintiff* which is impossible under 28 USC 1582.

The Sixth Circuit acknowledged this problem in its first opinion (A30):

> We do not agree that § 1582(2) is dispositive of any issue in this case. This is not an action "commenced by the United States," and it is not clear to us that, if the United States were to bring a civil action to enforce its liquidated damages claims, such an action could be said to have "arise[n] out of an import transaction." The application of this statute to the present dispute reveals the District Court's failure to discern the centrality of the Fifth Amendment due process issue and the difficulty of the factual and legal issues that underpin it. It is to that issue that we now turn.

B. Commodities still has no access to the CIT under 28 USC 1581.

Under 28 USC 1581 (A64-66), non Government parties may sue the Government in the CIT under very specific and restricted conditions.

The foundation of this case (and of the CIT case [A37-50] upon which the Sixth Circuit relied) is the assessment of liquidated damages made by the US Customs Service ("Customs") against Commodities' warehouse bond.

In its first opinion, in reference to a possible suit by Commodities seeking judicial review of bond liquidated damages brought against the Government in the CIT under 28 USC 1581(a) (*supra*, p 2), the Sixth Circuit correctly stated (A33-34):

> The only plausible category in which such a dispute could fit is set forth at 19 U.S.C. § 1514(a)(3) and 19 C.F.R. § 174.11(c): "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury...."

This is the protest procedure governed by the trilogy of statutes, 28 USC 1581(a)[*supra*, p 2]-19 USC 1515(a)[A57]-19 USC 1514(a)(3)[A54], codified in 19 CFR 174. (See A67.)

In *US v Utex Intern Inc*, 857 F2d 1408 (Fed Cir 1988) and *US v Toshoku America, Inc*, 879 F2d 815 (Fed Cir 1989), the Federal Circuit rejected the contention that bond liquidated damages are subject to protest. Following these decisions, the CIT ruled in *Halperin Shipping Co Inc v US*, 742 F Supp 1163, 1165 (CIT 1990):

> In order to obtain jurisdiction in this Court the government argues Halperin would have had to file a protest within ninety days of the June 18, 1982 Notice of Liquidated Damages....
>
> It is uncontroverted that Halperin did not file a protest within ninety days of the government's Notice of Liquidated Damages dated June 18, 1982. *Nevertheless contrary to the government's contention, the June 18, 1982 Notice of Liquidated Damages was not a protestable decision.* This argument has been squarely rejected by the Court of Appeals for the Federal Circuit, which has held that "an assessment of liquidated damages is not a 'charge or exaction' that must be challenged by protest under 19 U.S.C. § 1514...." *United States v. Toshoku America, Inc.*, 879 F.2d 815, 818 (Fed. Cir. 1989) (construing *United States v. Utex Int'l, Inc.*, 6 Fed. Circ. (T) 166, 857 F.2d 1408 (1988)). *Since the June 11, 1982 Notice of Liquidated Damages was not a protestable decision* it did not start the ninety day filing deadline and the fact that Halperin did

not protest the Notice of Liquidated Damages does not deprive this Court of jurisdiction.... (Emphasis added.)

Id., pp 1166-67.

As concerns the demand for liquidated damages, Halperin could have *petitioned* Customs for remission or mitigation of the *penalties* demanded by Customs pursuant to 19 U.S.C. § 1618.... (Emphasis added.)

Id., p 1167.

The absence of a valid protest is fatal to the maintenance of jurisdiction in this Court. (Emphasis added.)

Id., p 1168.

Commodities filed no protests in this case for the simple reason that bond liquidated damages are not subject to protest as the above decisions demonstrate. Therefore, Commodities has no access to the CIT under 28 USC 1581(a) (*supra*, p 2).

In its first opinion, the Sixth Circuit dissent (A37-38) stated that Commodities would have access to the CIT under 28 USC 1581(i) (*supra*, p 3).[12] This is untenable.

Whether bond liquidated damages are considered as penalties or contract damages flowing out of the warehouse bond (as Customs suggests),[13] nothing in 28 USC 1581(i) (or any other provision of 28 USC 1581 [full text, A64-66])

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[12]At oral argument before the Sixth Circuit on September 19, 1991 in Commodities' second appeal, Customs also suggested this.

[13]The controversy between Commodities and Customs over whether or not liquidated damages are penalties or contract damages devolves upon the applicable Statute of Limitations, to wit: 19 USC 1621 (penalties/5 years) or 28 USC 2415 (contracts/6 years).

encompasses liquidated damages.

C. CIT jurisdiction is premised upon importation or an import transaction. Duty-free stores operate exclusively in export.

28 USC 1582 clearly requires an import transaction and 1582(2) a bond relating to the importation of merchandise. (*Supra*, p 3.)

As to 28 USC 1581 (A64-66):

> Proposed section 1581 [28 USC 1581] grants the Court of International Trade jurisdiction over any civil action against the United States arising out of the federal statutes governing *import* transactions.... [Emphasis added.]
>
> 4 US Code Congressional & Administrative News (96th Congress, 2nd Session, 1980), Legislative History, Customs Courts Acts of 1980, p 3732.

Customs' position is that 19 USC 1555(a) (A54) which states that only imported merchandise may be stored in bonded warehouses is dispositive of the issue. However, the opening phrase of 1555(a) states: "Subject to subsection (b) of this section...." 19 USC 1555(b) (A55-59) which deals explicitly with duty-free sales enterprises says nothing about importation, imported merchandise, or import transaction but instead repeatedly emphasizes the export nature of duty-free stores.

Moreover, since the inception of duty-free stores in the late 1950's, Customs has routinely and without question permitted duty-free stores to store large quantities of tax-free domestic goods in their bonded warehouses (eg.: Jack Daniels, etc.). These domestic goods are subject to tax but not duty and they can never be classed as imported merchandise.

The language of 1555(a) upon which Customs relies went into effect on June 17, 1930. Nevertheless, on December 17, 1931, the Unites States Court of Customs and Patent Appeals ruled clearly and unequivocally in *Stone & Downer et al v US*, 19 CCPA 259, 264 (1931):

> No principle is better settled in this court than the one that goods in bonded warehouses are not to be considered as *imported* until a permit of delivery has been issued *and they enter into the commerce of the country.* A mere citation of but a few authorities will suffice: *Casazza & Bro. v. United States*, 13 Ct. Cust. Appls. 627, T.D. 41481; *Hartranft v. Oliver*, 125 U.S. 525; *Five Per Cent Cases*, 6 Ct. Cust. Appls. 291, T.D. 35508, and cases therein cited. (Emphasis added.)

Again, the CIT disagreed (A47-48) asserting in effect that *Stone* was implicitly reversed by the Supreme Court's decisions in *Xerox Corp v County of Harris*, 459 US 145 (1982) and *RJ Reynolds Tobacco Co v Durham County*, 479 US 130 (1986). However, there is nothing in the language or logic of either *Xerox* or *Reynolds* to support this conclusion. We found no case, recent or seasoned, which disagrees expressly or by implication with *Stone*.

The CIT (A46-52) has provided two conflicting definitions of importation relative to 28 USC 1582(2) (*supra*, p 3). "Importation" for purposes of an "import transaction" occurs when foreign goods enter US jurisdiction, i.e., cross the border. "Importation" for purposes of the bond "relating to the importation of merchandise" occurs when foreign goods "entered into the stream of commerce of the United States without payment of the appropriate duties and taxes." (A51.)

Within the framework of the same statute, 28 USC 1582(2) (*supra*, p 3), such a conflict in definitions of importation is legally and logically impossible.

What is required in this case is a definition of importation (and by extension import transaction) as it specifically applies to Customs bonded warehouses. Other definitions of importation (such as those cited by the CIT [A44-50]) are not on point. *Stone* is.

Duty-free stores are not in the business of injecting foreign goods into the US stream of commerce. On the contrary, duty-free stores are in the business of injecting both foreign and domestic goods into the stream of commerce of foreign countries. Thus, duty-free stores are in the business of export transactions, not import transactions.

With the exception of duty-free stores, practically all other bonded warehouses are used to expedite and facilitate the injection of foreign goods into the US stream of commerce.

This exception has made duty-free stores exempt from state and local sales and use tax laws and liquor and tobacco control laws. See *Hostetter v Idlewild Bon Voyage Liquor Corp*, 377 US 324, 84 S Ct 1293 (1964).

If duty-free stores are now to be classed as importers conducting import transactions to fit them into the jurisdiction of the CIT, these exemptions could be lost for state attorney generals could logically assume that imports were taking place not only into the US but also into the state where the duty-free store was located.

The whole point of the duty-free industry is to encourage tourism so that in a purely export situation premium foreign and domestic goods can be sold to travelers departing the US at a substantial reduction in cost, to wit, no tax, no duty.

Duty-free stores operate exclusively in export. The CIT's jurisdiction is premised on an importation or an import transaction - neither of which apply to duty-free stores.

D. Conflict between Fourth and Sixth Circuits.

On March 2, 1992, the Fourth Circuit decided *Trayco, Inc v US,* _____ F2d _____ (4th Cir 1992), 1992 US App LEXIS 3445, 4th Cir Slip Op 91-2555 (March 2, 1992).

The reasoning of the Fourth Circuit in that case cannot be reconciled with the opinion of the Sixth Circuit in the case at bar.

Factually, Trayco paid Customs a penalty under 19 USC 1304 for allegedly falsely certifying that individually packaged imported shower heads had been properly marked with the country of origin. Trayco, after exhausting all administrative remedies, then sued the Government in federal district court to recover the penalty and prevailed. The Government appealed arguing, *inter alia,* that the district court lacked jurisdiction which was exclusive in the CIT. The Fourth Circuit affirmed upholding jurisdiction in the federal district court pursuant to 28 USC 1346(a)(2), the Tucker Act. Although jurisdiction was also claimed under 28 USC 1355 (*supra,* p 8), the Fourth Circuit did not reach this issue.

In rejecting the Government's arguments about exclusive CIT jurisdiction, the Fourth Circuit stated:

> The linchpin of the government's jurisdictional argument is that, by enacting the Customs Courts Act, Congress intended to select one forum, the CIT, for the resolution of customs-related controversies such as this.
>
> The Customs Courts Act of 1980, 28 U.S.C. §§ 1581 *et. seq.*, confers exclusive jurisdiction in the CIT over many trade issues. Section 1581 contains nine subdivisions granting the CIT exclusive jurisdiction over specified civil actions. The government conceded at oral argument that none of the specific jurisdictional provi-

sions found in section 1581 encompass actions brought under section 304 of the Tariff Act, the section involved here. Furthermore, section 1582's grant of exclusive jurisdiction to the CIT applies only when the United States commences an import transaction suit, not when an importer brings a suit against the United States. Section 1583 only confers jurisdiction over counterclaims, cross-claims, and third-party claims which are not implicated here.

It is clear that no language in the Customs Courts Act of 1980 expressly provides the CIT with exclusive jurisdiction when an importer seeks refund of a penalty assessed under section 304 of the Tariff Act of 1930.

The government argues, however, that the detailed and comprehensive statutory scheme of the Customs Courts Act reveals an unmistakable congressional intent to confer exclusive jurisdiction in the CIT over controversies concerning penalties for the importation of mislabeled items.[3] In our view, that argument is effectively undercut by the Supreme Court's opinion in *K-Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988). The Court in *K-Mart* held that an action challenging a Customs' decision to permit the entry of "gray market" goods did not fall within the CIT's grant of exclusive jurisdiction. In reviewing the legislative history of the Customs Courts Act, the Supreme Court noted:

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[3]"It is the government's position that importers can never directly initiate an action to challenge penalties imposed under section 304 of the Tariff Act of 1930. The government stresses that, under the relevant statutes, an importer who disputes the validity of a penalty may simply decline to pay. Customs then must initiate judicial proceedings to recover the penalty. See 19 U.S.C. § 1604. If that procedure were followed, there is no question that the resulting action would be within the exclusive jurisdiction of CIT. See 28 U.S.C. § 1582(1)."

"Congress did not commit to the Court of International Trade's exclusive jurisdiction every suit challenging customs-related laws and regulations. Had Congress wished to do so it could have expressed such intent much more clearly and simply by, for example, conveying to the specialized court exclusive jurisdiction over all civil actions against the Government directly affecting imports, or over all civil actions against the Government which arise directly from import transactions and which arise under the Tariff Act of 1930...."

K-Mart at 187 (internal citations, brackets, quotation marks, and ellipses omitted).

The Customs Courts Act was, of course, enacted to ensure greater decisional uniformity in Customs controversies, and to utilize the specialized expertise of the CIT to ensure efficient allocation of judicial resources.[4] *K-Mart*, however, makes clear that there are some limits to the CIT's exclusive jurisdiction. In our view, such limits are found in congressional language or in the absence of it. That is, if Congress failed to affirmatively grant exclusive jurisdiction, it does not exist. Such is the case here.

Trayco, pp 5-8.

The Sixth Circuit using 28 USC 1582(2) (A67) as a basis found Commodities' claims against Customs pertaining to bond liquidated damages to be exclusive in the CIT. The Fourth Circuit, while conceding that a penalty collection action in the CIT commenced by the Government against Trayco under 28 USC 1582(1) (A67) would be subject to the

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[4]"See H. Rep. No. 96-1235, 96th Cong., 2d Sess. 20, reprinted in 1980 U.S.C.C.A.N. 3729, 3731."

CIT's exclusive jurisdiction, found no such exclusive jurisdiction when the action was commenced by Trayco against the Government over the same matter in the federal district court.

The parallel and conflict between the two circuits is clear, especially if bond liquidated damages are determined to be penalties (*supra,* p 8).

CONCLUSION

The Sixth Circuit vacated the judgment of the Detroit District Court dismissing Commodities' due process claims in order to give Commodities an opportunity for a trial on the merits.

However, in ordering this case transferred to the CIT, the Sixth Circuit nullified this opportunity. The CIT has no jurisdiction to hear these claims.

The writ of certiorari should issue to review this transfer to the CIT and to avoid possible conflict with the Fourth Circuit.

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Dated: June 22, 1992

APPENDIX

957 F2d 223 (6th Cir 1992)
No. 90-2308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMODITIES EXPORT CO.,
Plaintiff-Appellant,

V

U.S. CUSTOMS SERVICE,
Defendant-Appellee,

On Appeal from the United States District Court for the Eastern District of Michigan

Argued September 19, 1991

Decided and Filed February 19, 1992.

Rehearing Denied March 30, 1992.

Duty-free shop petitioned to enjoin Customs Service from enforcing liquidated damages assessments against it. After dismissal for lack of jurisdiction, case was remanded for evidentiary hearing, 888 F.2d 431. Customs Service brought suit in Court of International Trade (CIT) to enforce claim against shop. CIT held that it possessed exclusive subject matter jurisdiction over action between those two parties. Subsequently, the United States District Court for the Eastern District of Michigan, Lawrence P. Zatkoff, J., granted Customs' motion to dismiss. Shop appealed. The Court of Appeals, Merritt, Chief Judge, held that: (1) CIT's decision was res judicata, and (2) CIT had jurisdiction to consider

shop's due process argument.

Remanded with orders to transfer in part, vacated in part.

David A. Nelson, Circuit Judge, issued concurring opinion.

1. Customs Duties # 84(1)

Court of International Trade has power to decide its own jurisdiction. 28 U.S.C.A. § 1585.

2. Federal Courts # 1158
Judgment # 639

Court of International Trade's decision that it possessed exclusive subject matter jurisdiction over action between two parties who were before district court was res judicata; thus, district court was required to transfer action to Court of International Trade. 28 U.S.C.A. § 1585.

3. Customs Duties # 84(1)

Court of International Trade had authority to review "duty-free" shop's due process claim that Customs Service was attempting to ruin shop's business by bringing meritless or inflated assessments for liquidated damages in violation of Due Process Clause of Fifth Amendment U.S.C.A. Const. Amend. 5.

4. Federal Civil Procedure # 2655

Where, in Sixth Circuit, business appealed dismissal of its action on remand by district court, and in Federal Circuit business appealed Court of International Trade's (CIT) determination that it had exclusive jurisdiction over matter, if Federal Circuit were to reverse CIT's jurisdictional determination, which would result in two conflicting appellate

decisions, business could file in Sixth Circuit motion pursuant to Rule 60(b)(5), which provides relief from final judgment if prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that judgment should have prospective application. Fed. Rules Civ. Proc. Rule 60(b)(5), 28 U.S.C.A.

Walter H. Lubienski (briefed), Lubienski, Lubienski & Lubienski, Detroit, Mich., Roger E. Craig (argued and briefed), Naples, Fla., for plaintiff-appellant.

Carolyn Bell Harbin, Asst. U.S. Atty., William L Woodard (argued and briefed), Office of U.S. Atty., Detroit, Mich., for defendant-appellee.

Before: MERRITT, Chief Judge; NELSON, Circuit Judge; and CELEBREZZE, Senior Circuit Judge.

MERRITT, Chief Judge, delivered the opinion of the court, in which CELEBREZZE, Senior Circuit Judge, joined. NELSON, Circuit Judge, delivered a separate concurring opinion.

MERRITT, Chief Judge. Commodities Export Company seeks to enjoin the United States Customs Service from enforcing certain claims. The District Court originally dismissed Commodities' petition on the ground that the claims were within the exclusive jurisdiction of the Court of International Trade. We vacated that decision and remanded the case for further analysis of the jurisdictional issues. While Commodities' appeal was pending in this court, the Customs Service brought suit in the Court of International Trade ("CIT") to enforce one of its claims against Commodities. The CIT held that it possessed exclusive subject matter jurisdiction over the action between the two parties. Subsequently, the District Court granted Customs' motion to dismiss. The issue to be decided in this appeal is whether the

District Court should accord *res judicata* effect to the CIT's intervening decision. We hold that the CIT's decision is *res judicata*. Accordingly, we remand this case to the District Court with instructions to transfer Commodities' action to the CIT pursuant to 28 U.S.C. § 1631. Further, we vacate the decision of the District Court entered upon remand that Customs did not violate Commodities' due process rights.

I.

The underlying facts of the dispute between the two parties are set out in detail in *Commodities Export Co. v. United States Customs Service*, 888 F.2d. 431 (6th Cir. 1989). In that opinion, we vacated the decision of the District Court which had dismissed Commodities' action for lack of subject matter jurisdiction. In remanding the case, we asked the District Court to analyze the applicability of 28 U.S.C. § 1582(2) to Commodities' action.[1] We also ordered the Court to adjudicate the merits of the claim that the United States Customs Service ("Customs") violated Commodities' due process rights.

While Commodities' first appeal was pending in this Court, Customs sued Commodities in the CIT. Customs sought to

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[1]Section 1582 of Title 28 establishes CIT jurisdiction over civil actions commenced by the United States. The relevant language is:

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States --
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> ....
>
> (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury.

28 U.S.C. § 1582 (1980).

collect bond liquidated damages assessed against Commodities, damages which Commodities had disputed in its Sixth Circuit action. In the CIT, Customs asserted that the CIT had exclusive subject matter jurisdiction over Customs' action pursuant to § 1582(2). Commodities disagreed and moved to stay the CIT proceedings until the District Court completed its review of Commodities' action on remand.

In March 1990, the CIT ruled that it possessed exclusive jurisdiction over Customs' suit. *United States v. Commodities Export Co.*, 733 F. Supp. 109, 111 (Ct. Int'l Trade 1990). The CIT refused to stay its hand until the District Court decided Commodities' case on remand. It reasoned that "the District Court cannot have jurisdiction where this Court does." *Id.* at 111. Commodities then petitioned the Court of Appeals for the Federal Circuit for a writ of mandamus directing the CIT to vacate its opinion and to stay the proceedings pending resolution of the case before the District Court. In July 1990, the Federal Circuit, in an unpublished order, noted that "the better course, by far, would have been for the Court of International Trade to have stayed its proceedings until the district court proceeding [was] completed." *In re Commodities Export Co. and Old Republic Insurance Co.*, Misc. Docket No. 278 at 3, 4 (Fed. Cir. July 17, 1990). Nevertheless, the Federal Circuit held that Commodities had not shown that the CIT "clearly overstepped its authority in determining not to stay its proceedings." *Id.* at 3.

Meanwhile, back in the United States District Court, Commodities filed an Amended Petition for Supplemental Relief. Customs moved to dismiss the petition. Both parties then filed a flurry of motions and replies. The District Court held a hearing in October 1990 at which it heard argument, but received no testimony. In November the District Court

granted Customs' motion to dismiss.[2]

With respect to the statutory basis of its subject matter jurisdiction, the District Court found that "the arguments previously asserted by Commodities with respect to the applicability of § 1582(2) have already been addressed by the CIT." Order at 11. Put simply, the District Court adopted in its entirety the jurisdictional analysis offered by the Court of International Trade in its March 1990 decision. Thus, the District Court held that 28 U.S.C. § 1582(2) vests exclusive jurisdiction in the CIT over Commodities' action. The Court also rejected Commodities' due process claims. It is the District Court's dismissal of Commodities' action that Commodities now appeals. Commodities asks this Court to overturn the District Court's denial of Commodities' due process claim and to declare that jurisdiction is vested in the lower court pursuant to 28 U.S.C. § 1352 and § 1355.[3]

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[2]Subsequent to the District Court's dismissal of Commodities' action, the CIT denied a motion by Commodities to dismiss Customs' suit. *United States v. Commodities Export Co.*, 755 F. Supp. 418 (Ct. Int'l Trade 1991). In March, 1991, Customs filed suit in the CIT to collect liquidated damages from two additional assessments which were part of Commodities' suit in the District Court. The CIT tried one liquidated damages claim in April 1991 and entered judgment on a jury verdict in favor of Customs in May. Commodities then appealed both the CIT's jurisdictional determination and judgment to the Court of Appeals for the Federal Circuit. The appeal was docketed in the Federal Circuit on August 29, 1991, Docket No. 91-1470.

[3]Section 1352 of 28 U.S.C. states that:

> The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

Commodities argues that contrary to the CIT's ruling adopted by the District Court, Commodities is an exporter, not importer, of goods, and thus its warehouse bond does not fall within 28 U.S.C. § 1582, but rather

II.

While the Sixth Circuit reviews *Commodities Export Co. v. Customs*, the Federal Circuit considers the case of *United States v. Commodities Export Co.* Both actions involve the same parties and a common set of facts. Both courts face a complex jurisdictional issue of first impression. The intervening rulings by the Court of International Trade place us in a difficult position. To address the merits of Commodities' claims would mean denying *res judicata* effect to a judgment of another Article III court and resolving issues that have been fully and fairly litigated in that court. To declare the CIT's decision *res judicata* in the Sixth Circuit, however, would mean relinquishing supervisory power over Commodities' due process claims which the District Court has not addressed satisfactorily on remand. We discuss each issue in turn.

A. Bond Liquidated Damage Assessments

This case embraces two court-created doctrines: *res judicata* and the "bootstrap" principle. The doctrine of *res judicata* "ensures finality of decisions." *Brown v. Felsen*, 442 U.S. 127, 131 (1979). It serves to protect adversaries from

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28 U.S.C. § 1352 (1980).

Section 1355 of 28 U.S.C. states that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

Commodities argues that contrary to the CIT's ruling adopted by the District Court, the liquidated damage assessments levied against it by Customs are "penalties" within the meaning of 28 U.S.C. § 1355 (1980).

the expense and vexation attending multiple lawsuits, to conserve judicial resources, and to foster reliance on judicial action by minimizing the possibility of inconsistent decisions. *Montana v. United States,* 440 U.S. 147, 153-54 (1979). The "bootstrap" principle states that federal courts ordinarily have the power to determine their jurisdiction over an action. *See Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 376 (1939); Restatement (Second) Of Judgments § 11 cmt. c (1982) [hereinafter Restatement]; 1B James W. Moore, Moore's Federal Practice ¶0.405[4.-1], at 206 (1991) [hereinafter Moore]. The two doctrines intersect to produce the general rule that jurisdictional determinations are given *res judicata* effect. *Durfee v. Duke,* 375 U.S. 106 (1963); *Stoll v. Gottlieb,* 305 U.S. 165 (1938); *Shaw v. Merritt-Chapman & Scott Corp.,* 554 F.2d 786, 789 (6th Cir. 1977).

The doctrines did not always intersect. Traditional black-letter law placed greater importance on confining courts within the scope of their jurisdictional mandate than in achieving repose in litigation. Thus, until the late nineteenth century, the judgment of a court which lacked power over the subject matter of the action was deemed null and void. *See* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice And Procedure\N § 4428, at 271-72 (1981) [hereinafter Wright]; Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments,* 87 YALE L.J. 164 (1977). In a series of decisions, most notably, *Chicot, supra, Treinies v. Sunshine Mining Co.,* 308 U.S. 66 (1939), *Stoll, supra,* and *Des Moines Navigation & R.R. v. Iowa Homestead Co.,* 123 U.S. 552 (1887), the Supreme Court shifted the emphasis from jurisdictional sovereignty to judicial finality. After the Court's decision in *Durfee,* "it seems clear that federal court judgments are binding notwithstanding a simple lack of subject matter jurisdiction . . . ." 18 Wright, *supra,* § 1428, at 282. *Accord* Restatement, *supra,* § 12 cmt. a (1982); Dobbs, *The Validation of Void Judgments: The Bootstrap Principle,* 53 VA L.REV. 1003 (1967).

Like most legal rules, the bootstrap principle is subject to certain exceptions. Because the CIT is no ordinary federal court, and because Commodities is no ordinary import-export company, it is necessary to examine whether any of the exceptions to the bootstrap principle apply to the present case.

In discussing these exceptions, it is useful to separate the issue of the court's *power* to determine its jurisdiction from the issue of whether its determination should be binding. The former issue raises questions of legislative intent; the latter, questions of judicial policy. *See generally* Dobbs, 53 VA L.REV. at 1013, 1027, 1247-48. The two-part bootstrap analysis begins by addressing the issue of power. Only after it is established that the legislature granted the CIT power to decide its own jurisdiction do we then examine whether judicial policy favors the application of *res judicata* to the CIT's judgment. *See id.*

The capacity of federal courts to determine their own jurisdiction derives in large part from the confidence Congress and the Constitution have reposed in Article III courts, specifically, through the substantial (though limited) powers given them. A corollary to this observation is that "[a] court whose jurisdiction is closely confined is one in which the legislature has reposed little confidence; if the legislature has little confidence in a court, it is less likely to have granted that court jurisdiction to determine its own jurisdiction." Dobbs, 53 VA. L.REV. at 1252. *See also* 18 Wright, *supra*, § 1428; 1B Moore, *supra*, ¶0.405[4.-1], at 204-06, nn. 17-22. (1991); Restatement (First) Of Judgments § 10(2)(c) (1942); *Anderson v. Pinkett*, 439 F.2d 619 (D.C.Cir. 1971). Within this framework, the Court of International Trade's position is unique. The CIT is a special Article III court, created by Congress to exercise jurisdiction "exclusively . . . in the resolution of conflicts and disputes arising out of the tariff and international trade laws . . . ." H.R.Rep. No. 1235, 96th

Cong., 2d Sess. 47, *reprinted in* 1980 U.S.C.C.A.N. 3729, 3739 ("Customs Court Act of 1980"). *See also* 17 Wright, *supra* § 4103, at 377 (1988) ("The Court of International Trade is one of the few remaining federal courts of specialized jurisdiction."). Thus, the CIT is embued with many powers wielded by federal district courts, *see e.g.*, 28 U.S.C. § 1585, yet is highly restricted in the scope of its subject matter authority.[4] In light of its narrowly circumscribed jurisdiction it is reasonable to inquire whether Congress intended the CIT to have the power to decide its own jurisdiction.

Not surprisingly, Congress did not speak directly to this issue when it created the CIT in 1980. Nevertheless, when we consider the role Congress intended for the CIT within the larger system of federal courts, it becomes apparent that the CIT acted squarely within its power when it asserted jurisdiction over the present suit. Under the Customs Court Act of 1980, Congress established the CIT as the successor to the then-existing Customs Court. Congress enacted the legislation to respond to widespread confusion concerning the respective jurisdiction of the United States District Courts and

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[4]Section 1585 states:

> The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.

We note that 28 U.S.C. § 1585 does not, by itself, resolve the issue whether the CIT has jurisdiction to determine its jurisdiction. The statute speaks to the power of the CIT once jurisdiction is established. It does not expressly confer (or deny) the power to determine jurisdiction. Nor does it expand the CIT's jurisdiction. *See Manufacture de Machines du Haut-Rhin v. Von Raab*, 569 F. Supp 877 (Ct. Int'l Trade 1983). Granted, the more the CIT resembles the District Court with respect to the powers it wields, the more persuasive is the argument that the CIT, like the District Court, ought to be able to determine its own jurisdiction. Section 1585, however, is not dispositive on this point.

the Customs Court. The Act's legislative history describes the then prevailing situation:

> [B]ecause of the limited powers of the Customs Court, litigants often choose another forum, for example, the federal district courts, where they can gain the appropriate relief for their injuries. Most district courts have refused to entertain such suits, citing the Constitutional mandate requiring uniformity in decisions relating to imports....In doing so, the district courts sought to preserve the Congressional grant of exclusive jurisdiction to the United States Customs Court for judicial review of all matters relating to imports.
>
> The result has been inconsistent judicial decisions....[T]he type of relief available depends greatly upon a plaintiff's ability to persuade a court that it possesses jurisdiction over a particular case. Thus, some individuals will obtain relief which is denied others, who by chance select an improper forum to institute suit.

H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47, *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731. Congress, through the Act, revamped the Customs Court's jurisdiction and increased its remedial powers in order to provide "a comprehensive system of judicial review of civil actions arising from import transactions," thereby "ensur[ing] greater efficiency in judicial resources and uniformity in the judicial decisionmaking process." *Id.* To these ends, Congress also established a right of appeal of CIT decisions to the Federal Circuit. 28 U.S.C. § 1295(a)(5) (1982).

Congress invested the CIT with exclusive jurisdiction over a wide range of trade matters encompassing complex regulatory schemes in order to allocate power between the CIT and the district courts. To hold that the CIT *lacks* the power to determine its own jurisdiction would undermine Congress'

goal of creating uniformity with respect to this nation's trade laws. *See* Dobbs, 53 VA. L.REV. at 1256. Such a holding would invite the various district and circuit courts to redraw the jurisdictional lines separating the two tribunals, and thereby jeopardize the uniformity which Congress, through the Act, sought to secure. Accordingly, we hold that that the CIT has the power to decide its own jurisdiction.

We turn now to whether, as a matter of policy, the CIT's judgment should be deemed *res judicata*. As noted earlier, the bootstrap principle is not without exceptions. *Durfee*, 375 U.S. at 114. Were a substantial public interest to be undermined or an intentional and flagrant usurpation of judicial authority to be perpetuated by a *res judicata* determination, then there would be strong grounds for not giving preclusive effect to the jurisdictional decision. *See id.* at 114 n.12; Dobbs, 53 VA. L.REV. at 1013, 1257-58. Section 12 of the Restatement (Second) Of Judgments sets out factors to be examined in deciding whether, as a matter of *policy, res judicata* should attach to a court's jurisdictional determination. The Restatement suggests that a jurisdictional determination should not be deemed conclusive if:

(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a *manifest abuse of authority;* or

(2) Allowing the judgment to stand would *substantially infringe* the authority of another tribunal or agency of government; or

(3) The judgment was rendered by a court *lacking capability to make an adequately informed determination* of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

(emphases added). *See* also Dobbs, 53 VA. L.REV. at 1248-57.

Commodities operates a warehouse in which it stores foreign goods later sold in the United States. As a duty-free shop, Commodities is required by federal law to maintain a bond on the warehouse. 19 U.S.C. § 1555 (1930). The bond is meant to guarantee that Commodities will comply with the numerous regulations for storing merchandise in and withdrawing it from its bonded warehouse. 19 U.S.C. § 1623(a) (1930). Thus, when Customs filed suit in the CIT, its action to recover liquidated damages arising out of Commodities' alleged breach of the bond's conditions reasonably appeared to the CIT to be the type of action envisioned by the authors of § 1582(2). *See supra* note 1.

While it can be argued that this case presents a difficult jurisdictional question capable of being resolved in either party's favor, *see supra* note 3, it is not plausible to argue that the CIT "manifestly abused its authority" by asserting jurisdiction. Congress intended that the CIT bring its "specialized expertise" to bear on actions arising out of import transactions. H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47, *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731, 3760. In light of this expertise, it is hard to maintain that the CIT "lacked capability to make an adequately informed determination of a question concerning its own jurisdiction." Similarly, it is difficult to argue that the District Court's authority was "substantially infringed" by the CIT's assertion of jurisdiction since this case presents a jurisdictional issue of first impression. In sum, far from abusing its authority, the CIT could reasonably believe that it was uniquely qualified and empowered to hear Customs' case.

Accordingly, we hold that the CIT has the power to determine its own jurisdiction, that the CIT properly exercised that power in this case, and that its jurisdictional

determination is *res judicata*. The preclusive effect of the CIT's jurisdictional determination is not lessened by the fact that Commodities has appealed that determination to the Federal Circuit, for it is well established that a final trial court judgment operates as *res judicata* while an appeal is pending. *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 188-89 (1941); *Southern Pac. Communications Co. v. AT&T Co.*, 740 F.2d 1011, 1018 (D.C. Cir. 1984); *Refior v. Lansing Drop Forge Co.*, 134 F.2d 894, 896 (6th Cir. 1943). *See also* Restatement, *supra*, § 13 cmt. f; 18 Wright, *supra*, § 4433, at 308, 311; 1B Moore, *supra*, ¶0.416[3], at 521. Nor does the preclusive effect of the CIT's determination depend upon the correctness of the decision, for even erroneous judgments are accorded *res judicata* effect. *Angel v. Bullington*, 303 U.S. 183, 187 (1947).

B. Commodities Due Process Claim

Having held the CIT's jurisdictional ruling *res judicata*, we turn to Commodities' due process claims. Commodities asserts that the Detroit office of the Customs Service has set out to ruin Commodities' business by bringing meritless or inflated assessments for liquidated damages in violation of the Due Process Clause of the Fifth Amendment. (Commodities advanced a similar allegation in 1976 when it sought, and received, an injunction against Customs after Customs mandated that Commodities institute new and onerous operating procedures or cease business). Commodities' allegations were ignored by Customs and by the District Court in the first round of litigation. We remanded the case for a hearing on Commodities' due process claim. On remand, the District Court heard argument and accepted extended briefing, but received no testimony. The Court concluded that no due process violation occurred.

After reviewing the record and having twice listened to oral

argument, we remain of the opinion that Commodities has not been given adequate opportunity to present its due process arguments to a court of law. We therefore vacate the District Court's due process decision. The issue which then arises is whether, despite its tightly circumscribed jurisdiction, the CIT has the authority to review Commodities' due process claim, or whether we must sever that claim from the rest of the case and remand to the District Court for further proceedings. For reasons set out below, we believe that the CIT does possess adjudicatory authority over Commodities' due process claim.

Section 1585 of Title 28 of the United States Code states that the CIT "shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585 (1980). In contrast, the CIT's forerunner, the Customs Court, possessed powers similar to those of a district court only with respect to "preserving order, compelling the attendance of witnesses and the production of evidence." 28 U.S.C. § 1581 (1976), *amended by* 28 U.S.C. § 1585 (1982). Despite the Customs Court's more limited powers, courts had "long recognized that the Customs Court [had] authority to adjudicate issues of a constitutional nature." *J.C. Penney Co. v. United States Treasury Dept.*, 439 F.2d 63, 66 (2d Cir. 1971).

The Customs Court's authority to pass on constitutional issues was challenged as early as 1934, when an importer of spirits attacked as unconstitutional the Tariff Act of 1922 under which he was forced to pay customs duties. *Riccomini v. United States*, 69 F.2d 480 (9th Cir. 1934). The plaintiff-importer filed suit in federal district court. The court sustained the government's demurrer, holding that jurisdiction properly rested in the Court of Customs Appeals (the precursor to the Customs Court). On appeal, the plaintiff claimed that the Court of Customs Appeals "is not competent to determine the constitutionality of a statute, and that therefore [plaintiff] must repair to the United States District Court for

relief." *Id.* at 483. The Ninth Circuit rejected this contention. Surveying the Customs Administration Act of 1890, and the Tariff Acts of 1909 and 1922, it observed that "Congress meant to establish a complete and exclusive system for the handling of customs cases . . . ." 69 F.2d at 483. Though the Court of Customs Appeals, unlike the present-day CIT, was "a legislative and not a constitutional court," *see Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), the Ninth Circuit held it competent to adjudicate constitutional claims. 69 F.2d at 483.

The Customs Court's authority was challenged again in 1960 when a group of petroleum importers attacked the constitutionality of a Presidential proclamation raising taxes on petroleum imports. *Eastern States Petroleum Corp. v. Rogers*, 280 F.2d 611 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960). The District Court dismissed the action for lack of jurisdiction. On appeal, the importers asserted that they were "constitutionally entitled . . . to have [their] constitutional claims heard and determined in an Article III court . . . ." *Id.* at 614. The Court of Appeals for the District of Columbia, noting there was "considerable doubt" as to the Article III status of the Customs Court, assumed, *arguendo*, that it was a legislative court. *Id.* The appeals court nevertheless determined that "[e]ven in cases where an adverse decision of the customs courts involving constitutional questions stands unreviewed [by an Article III court]," due process is not denied. *Id.*

In light of the CIT's Article III status, and the right of appeal to the Federal Circuit, with recourse to the Supreme Court through petition for certiorari, *Commodities Export Co.* presents a stronger case for the CIT's authority to adjudicate constitutional claims than *Riccomini* and *Rogers*. In short, Judge Bazelon's words in *Rogers* ring even truer today: "In our view, the distinctions between the customs courts and the district courts do not rise to a level at which it may be said

that final adjudication of constitutional questions in the customs courts offends the requirements of due process." *Accord Horton v. Humphrey,* 146 F. Supp. 819 (D.D.C.), *aff'd,* 352 U.S. 921 (1956). Thus, we transfer this case in its entirety to the CIT, pursuant to 28 U.S.C. § 1631.

Our holding comports with the principles of judicial economy articulated in the Customs Court Act. Commodities' due process claims are closely intertwined with the merits of Customs' bond liquidated damages assessments. Findings of fact with respect to one will likely affect the outcome of the other. Thus, to sever the claims "so that the district [court] deal[s] with . . . constitutional issues arising out of customs controversies while the [CIT] concerns itself with the remaining customs issues," *J.C. Penney Co. v. United States Treasury Dept.,* 439 F.2d 63, 66 (2d Cir. 1971), would undermine Congress' attempt to ensure "greater efficiency in judicial resources and uniformity in the judicial decisionmaking process." H.R.Rep. No. 1235, 96th Cong., 2d Sess. 47, *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731.

III.

In the Sixth Circuit Commodities appeals the dismissal of its action on remand by the District Court. In the Federal Circuit it appeals the CIT's jurisdictional determination and subsequent judgment awarding Customs liquidated damages. The pendency of dual appeals in sister circuits complicates matters. Should the Federal Circuit overturn the CIT decision which we deem binding, there would result two conflicting appellate decisions, each entitled to conclusive effect. *See Reed v. Allen,* 286 U.S. 191 (1932).

We believe that such a conundrum can be avoided through recourse to Fed. R. Civ. P. 60(b)(5). That Rule provides that "[o]n motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding

[if] . . . (5) . . . a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . . ." Were the Federal Circuit to reverse the CIT's jurisdictional determination, Commodities could file a Rule 60(b)(5) motion in this Circuit. Similarly, Commodities could make such a motion were its due process claims left wholly unaddressed by the CIT and Federal Circuit. Recourse to Rule 60(b)(5) in such circumstances is endorsed by courts and commentators alike. *See, e.g., Hawkes v. IRS,* 467 F.2d 787, 793 (6th Cir. 1972); *Michigan Surety Co. v. Service Machinery Corp.,* 277 F.2d 531 (5th Cir. 1960). *See generally* Restatement, *supra,* § 16 (1982) ("A judgment based on an earlier judgment is not nullified automatically by reason of the setting aside, or reversal on appeal . . . but the later judgment may be set aside, in appropriate proceedings . . . . "); 1B Moore, *supra,* ¶0.416[4], at 530; 7 Moore, *supra,* ¶60.26[3]; 11 Charles A. Wright & Arthur R. Miller, Federal Practice And Procedure\N, § 2863, at 203-04 (1973); 18 Wright, *supra,* § 4433, at 312 n.15 (1981).

IV.

Adhering to the well-established principle of *res judicata,* and in the interest of judicial economy, we REMAND this case to the District Court with orders to TRANSFER Commodities' action to the Court of International Trade pursuant to 28 U.S.C. § 1631. Further, we VACATE the due process portion of the District Court's decision entered after our first remand of this case.

DAVID A. NELSON, Circuit Judge, concurring. I concur in the judgment and in most of Chief Judge Merritt's scholarly opinion. Unlike my colleagues, however, I am not prepared to say that the district court failed to accord Commodities an adequate opportunity to present its due process arguments.

The reason the district court's due process decision ought to be vacated, in my view, is that we erred in directing the district court to decide the due process issues in the first place. As indicated in the separate opinion I filed when this case was last before us, 888 F.2d at 439-40, I have thought from the beginning that the case belonged in the Court of International Trade and not in the district court.

888 F2d 431 (6th Cir 1989)
No. 88-2068

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMODITIES EXPORT CO.,
Plaintiff-Appellant,

V

U.S. CUSTOMS SERVICE,
Defendant-Appellee,

Argued July 27, 1989

Decided and Filed October 24, 1989

Duty-free shop petitioned to enjoin the Customs Service from enforcing liquidated damages assessments against it. The United States District Court for the Eastern District of Michigan, Philip Pratt, Chief Judge, dismissed the case for lack of jurisdiction, and petitioner appealed. The Court of Appeals, Merritt, Chief Judge, held that due process claims asserted by petitioner raised genuine issues of material fact, entitling it to evidentiary bearing on issue whether the district court or the Court of International Trade had jurisdiction over its claims.

Vacated and remanded.

David A. Nelson, Circuit Judge, concurred in part and dissented in part with opinion.

1. Federal Civil Procedure #1825

A motion to dismiss under Rule 12(b), and in particular a motion citing a jurisdictional defect, requires a preliminary hearing or hearing at trial to determine any disputed facts upon which the motion or opposition to it is predicated. Fed.Rules Civ.Proc.Rule 12(b), (b)(1), (d), 28 U.S.C.A.

2. Federal Civil Procedure #1825

Standard to be applied in determining whether hearing is required on a motion to dismiss is equivalent to that used in ruling on a motion for summary judgment: that is, where genuine issues of material fact exists, they must be submitted to decision on the evidence. Fed.Rules Civ.Proc.Rules 12(b)(l), (d), 56(c), 28 U.S.C.A.

3. Federal Civil Procedure #1825

Only where the facts are relatively simple, and substantially uncontroverted, and the law is not complex, is a district court justified in ruling on a motion to dismiss predicated on a jurisdictional defect without pausing to make findings on disputed questions of fact. Fed.Rules Civ.Proc.Rule 12(b)(l), (d), 28 U.S.C.A.

4. Federal Civil Procedure #2481

Due process claims asserted by duty-free shop in its suit seeking to enjoin enforcement of liquidated damages assessments by the Customs Service raised genuine issues of material fact, entitling shop to an evidentiary hearing on issue of whether the district court or the Court of International Trade had jurisdiction over the claims. U.S.C.A. Const.-Amend. 5.

Roger E. Craig (argued), Naples, Fla., Walter H. Lubienski, Lubienski, Lubienski & Lubienski, Detroit, Mich., for plaintiff-appellant.

Carolyn Bell Harbin, Asst. U.S. Atty. (argued), Detroit, Mich., for defendant-appellee.

Before: MERRITT, Chief Judge; NELSON, Circuit Judge; and CELEBREZZE, Senior Circuit Judge.

MERRITT, Chief Judge.

Commodities Export Company appeals from the decision of the District Court holding that the District Court lacked jurisdiction over Commodities' petition for an injunction barring the United States Customs Service from enforcing certain claims. Without reaching a due process issue present in the case, the District Court held that the controversy was within the exclusive jurisdiction of the Court of International Trade. We conclude that the District Court reached a legally erroneous conclusion in its interpretation of 28 U.S.C. § 1582(2), and that it prematurely decided other issues without holding a hearing on Customs' motion to dismiss. Accordingly, we vacate the decision below and remand this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

Commodities operates a "duty-free" shop in Detroit, Michigan, in which U.S. excise taxes and tariffs are not charged on the goods sold. Its facility is said by the parties to be the only duty-free shop located on the U.S. side of the "point of no return" - that is, the point at which a customer carrying goods recently purchased from the duty-free shop must take them through a Customs checkpoint in order to bring them into the United States and insert them into the stream of commerce here. It appears that the Detroit office of the Customs Service was unwilling to allow Commodities to operate at its unusual location because of the heightened risk of "runaways." "Runaways" are goods that have been sold at a duty-free shop without federal and state taxes and duties on the supposition that the goods would immediately be taken

out of the United States, but that are taken into the United States instead.

Commodities sued Customs in District Court in 1976 and obtained a court order commanding Customs to allow Commodities to operate a duty-free shop on the United States side of the point of no return. The order specified the parties' respective duties in the maintenance of a surveillance regime that would allow Customs to ensure that goods sold by, Commodities did not "run away." In 1985 that court order was amended, pursuant to an agreement of the parties, to allow Commodities to videotape its operations as a less expensive means of providing documentation of runaways. The District Court has retained jurisdiction over the original dispute.

Since the original order, Customs has brought several assessments for liquidated damages on Commodities' warehouse bond. As a duty-free shop, Commodities is required to maintain this bond by federal law. 19 U.S.C. § 1555. The bond is meant to guarantee that Commodities will comply with the numerous regulations for storing merchandise in and withdrawing it from its bonded warehouse. 19 U.S.C. § 1623(a). The Secretary of the Treasury is authorized to affix penalties to breaches of the conditions of a bond, and in particular may assess liquidated damages on the bond. 19 U.S.C. § 1623(b)(1).

Acting under this authority, the Customs Service notified Commodities of more than twenty assessments for liquidated damages. Following the District Court, we divide these into five groups. The first (#1), dated June 14, 1983, assesses $775.35 on the grounds of inventory shortages that allegedly violated customs regulations. The second (#2), dated March 21, 1983, assesses $6,293.96 on the grounds of inventory shortages and on the grounds that certain goods were not marked in accordance with regulations. The third (#3), dated April 4, 1986, assesses $141,868.00 on the grounds of inade-

quate recordkeeping and marking of merchandise, unreported shortages and unreported breakage. The fourth (#4) is a series of 17 assessments, dated November 28, 1986 and totalling $850,000: it is not immediately clear what alleged breaches underlie these assessments. The fifth (#5), dated June 15, 1987, assesses $5,217.50, the total price of goods sold during a gap in the videotape of Commodities' operations on May 21, 1987.

Commodities seeks an injunction against the enforcement of four of these assessments, #1, #2, #3 and #5. All parties appear to agree that the fourth assessment was settled, though Commodities asserts that Customs officials refused to give it a valid receipt until this suit was filed. The parties disagree about the status of #3. Customs asserts that it is under administrative review and therefore is ripe neither for enforcement nor for this contest. Commodities asserts that this claim is settled because Customs cashed its check for $668.00 made out with a restrictive endorsement stating that it was payment in full. It appears that, as to #3, Commodities seeks an injunction barring Customs from continuing to treat this claim as unsatisfied; it also argues that the claim is improper because it seeks to enforce internal regulations of Customs that are not binding on the public.

Setting aside for the moment the difficulties attendant on the specific assessments enumerated above, Commodities' basic complaint before the District Court was that it had done everything required of it to obtain administrative review of the assessments and that Customs has ignored all its pleas for due process and has proceeded to enforce the claims without administrative review. Commodities contends that it sought administrative review by what it deemed to be the proper means under the Customs regulations, 19 C.F.R. § 172. This section of the Customs regulations prescribes the means by which a private party subject to liquidated damages on a Customs bond may petition for relief. Commodities empha-

sizes that each notice of liquidated damages it received from Customs specified that, in order to prevent the assessment from becoming final and subject to enforcement, Commodities was required to take recourse to the petition process set forth in 19 C.F.R. § 172. In each petition, Commodities also requested a hearing under the APA and correct information about the challenged claims under the Freedom of Information Act.

Commodities argues that, after refusing to give due consideration to its petitions, Customs proceeded to enforce the assessments. Although the District Court appears not to have ruled on this issue, the record before us indicates that Customs has set its collection machinery in motion, though it has not actually sued on the bond. On March 20, 1988, Customs sent Commodities final demands for payment stating that enforcement proceedings would commence in 10 days. JA 160-61. Commodities filed its motions in District Court nine days later. After the District Court denied Commodities' motion for a stay pending appeal, Customs made a formal demand for payment from Commodities' surety. JA 196.

Commodities also makes a number of allegations tending to show that Customs does not plan to restrict its actions to efforts to enforce the assessments. Commodities alleges that Customs officials have threatened to "terminate Commodities' business by refusing Customs service to Commodities." Petition for Supplemental Relief, Paragraph 11; JA 17. Commodities also alleges that a Customs official threatened to "do everything in his power" to make it impossible for Commodities to operate as a duty-free shop, in part on the grounds that the video monitoring system installed by order of the District Court violated the Customs laws. Petition for Supplemental Relief, Paragraph 17, JA 19; R. 46, Ex. T, JA 88. Commodities claims that the official making the latter threat indicated that "he was retiring soon and had nothing to lose," creating an inference that he intended to exceed the scope of his

legitimate authority or to pursue an illegitimate end by the use of otherwise legal means.

II. DECISION OF THE DISTRICT COURT

The District Court held that it lacked jurisdiction over these claims because the Customs Court Act of 1980 vested exclusive jurisdiction over this species of dispute in the newly created Court of International Trade. It made two separate analyses, one applying 28 U.S.C. § 1581(a)[1] to assessment #5 and another applying 28 U.S.C. § 1582(2)[2] to assessments #1 and #2. First, analyzing claim #5 (involving the videotape system's failure) the District Court reasoned that a duty-free shop was a bonded warehouse established under 19 U.S.C. §

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[1]Section 1581 of Title 28 establishes CIT jurisdiction over civil actions against the United States and its agencies and officers. The pertinent subsection is as follows:

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

28 U.S.C. § 1581(a). Section 515 of the Tariff Act of 1930 is codified at 19 U.S.C. § 1515, which provides for administrative review of protests against decisions of customs officers filed under 19 U.S.C. § 1514. See below.

[2]Section 1582 of Title 28 establishes CIT jurisdiction over civil actions commenced by the United States. The relevant language is:

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States -...
>
> (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury....

28 U.S.C. § 1582.

1555; that the Secretary of the Treasury was empowered by 19 U.S.C. § 1623(a) and (b)(1) to regulate such bonded warehouses and to assess against the warehouse bond liquidated damages for violations of relevant regulations; that liquidated damages assessments were subject to administrative review under 19 C.F.R. § 172 (petition process for objecting to liquidated damages) *and* 19 U.S.C. §§ 1514, 1515 and 19 C.F.R. § 174 ("protest" procedure for obtaining administrative review); and finally that Congress has vested exclusive jurisdiction over appeals from decisions on protests in the CIT, 28 U.S.C. § 1581(a).

The District Court did not analyze the difference between the *petition* process set forth at 19 C.F.R. § 172 and the *protest* procedure set forth at 19 U.S.C. §§ 1514, 1515 and 19 C.F.R. § 174. Here we will only observe that the petition process is required of those who wish to object to an assessment of liquidated damages, and triggers a reconsideration of a liquidated damages assessment by the district director of the Customs office that issued the assessment and in some cases by the Commissioner of Customs. The appropriate Customs official is empowered to cancel the assessment and to give other appropriate relief, but is not required to hold a hearing. Beyond its provision for a first and a second supplemental petition, 19 C.F.R. § 172 does not indicate that an adverse decision on a liquidated damages petition is subject to further administrative or judicial review. The protest procedure, on the other hand, is available for certain specified actions of Customs, 19 U.S.C. § 1514(a), 19 C.F.R. § 174.11. This procedure includes provision for further review of an adverse initial decision on the protest, 19 C.F.R. § 174.23-27, and is the predicate for judicial review in the CIT under 28 U.S.C. § 1581(a). In brief, the petition process appears to be a procedure allowing a kind of right of reply to the decisionmaker, while the protest procedure sets in motion the full process of administrative and judicial review. Without exploring these distinctions between the two processes or

specifying how the relevant statutes and regulations apply to this case, the District Court ruled that Commodities had access to both procedures, and thus could have obtained judicial review in CIT by the protest procedure.

Second, ruling on claims #1 and #2, the District Court held that these were civil actions commenced by Customs to recover on an importation bond, and thus were within an explicit grant of exclusive jurisdiction to the CIT at 28 U.S.C. § 1582(2). It held that Commodities' argument that these assessments were brought after expiration of the relevant limitations period was nothing more than a defense to this action, and thus did not create jurisdiction which was otherwise lacking. Finally, it rejected Commodities' argument that duty-free shops are not in the business of importation and thus are outside the reach of § 1582(2).

The District Court declined to rule on claim #4 because it found that it was still under administrative review. On Commodities' post-judgment motion for reconsideration, as amended, the District Court refused to reconsider its decision, to grant a stay of enforcement, and to transfer this case to the CIT pursuant to 28 U.S.C. § 1631.

III. JURISDICTION

We conclude that the District Court's analysis of the jurisdictional issue was legally incorrect in one respect and that it was otherwise premature. In doing so we acknowledge the special nature of this case. First, no case has been cited to us, and our research reveals no case, in which the jurisdiction of the Court of International Trade has been invoked, either successfully or unsuccessfully, in a dispute involving the management of a bonded warehouse maintained by a duty-free shop. Second, no case has been cited to us, and our research reveals no case, in which a private party subject to liquidated damages on a bond required by Customs has

availed itself of the protest procedure and has then sought judicial relief, thus raising the issue of exclusive CIT jurisdiction. In at least these two respects, therefore, this case presents issues of first impression. And third, this case is, it is hoped, factually unique: Commodities not only contests specific assessments for liquidated damages, but asserts that the Detroit office of the Customs Service has set out to use and abuse its regulatory powers in order to put Commodities out of business. This due process claim, which has been present in this case since Commodities stated it in its petition for an injunction, has apparently been ignored by Customs and by the District Court. All three of these difficulties have direct jurisdictional implications which may, once the relevant facts are found, require the District Court to exercise jurisdiction over this case.

In remanding this case, however, we note that the District Court was confronted as we have been - by confusing and unhelpful briefing and analysis on both sides. The customs laws and regulations are very technical and complex and the growing body of law on CIT jurisdiction is nowhere directly dispositive of this case. In such circumstances a court hopes for less dismissive treatment of the issues than the Customs Service has given them here, and for less inflammatory, more analytical treatment of the issues than Commodities has provided. We hope that, on remand, some of the now intractable difficulties of this case can be clarified by fully adequate fact-finding and more carefully explicated application of the law to the facts.

A. APPLICATION OF 28 U.S.C. § 1582(2). Section 1582(2) of Title 28 is set forth in footnote 2 above. The District Court held that jurisdiction over Commodities' contest of claims #1 and #2, both arising from alleged recordkeeping improprieties and inventory shortages, is vested in the CIT by virtue of this statute.

Before turning to the merits of this jurisdictional issue, we note that the District Court founded its jurisdictional ruling on claims #1 and #2 on 28 U.S.C. § 1582(2), while it provided a separate analysis under 28 U.S.C. § 1581(a) and related statutes for holding that the CIT has exclusive jurisdiction over the liquidated damages assessment arising from the videotape failure. We make no such distinction between these two groups of claims. All are assessments of liquidated damages on Commodities' warehouse bond, and all are based on breaches of the bond in matters relating to the required maintenance of the warehouse. Commodities seeks the same relief with respect to all the claims, and implicates all of them in its allegations that Customs' general course of conduct in regulating Commodities' Detroit store violates the due process clause of the Fifth Amendment.

We do not agree that § 1582(2) is dispositive of any issue in this case. This is not an action "commenced by the United States," and it is not clear to us that, if the United States were to bring a civil action to enforce its liquidated damages claims, such an action could be said to have "arise[n] out of an import transaction." The application of this statute to the present dispute reveals the District Court's failure to discern the centrality of the Fifth Amendment due process issue and the difficulty of the factual and legal issues that underpin it. It is to that issue that we now turn.

B. DUE PROCESS. On appeal, Commodities argues that it was entitled to a hearing in the Court below on *all* the jurisdictional arguments it advances. We conclude that the District Court did indeed err in failing to hold a hearing on Commodities' due process claims; its arguments asserting statutory grounds for district court jurisdiction arise in different postures and we give them a separate discussion.

[1-3] The District Court dismissed this case on Customs' motion, brought under Rule 12(b)(1) of the Federal Rules of

Civil Procedure, to dismiss for lack of subject matter jurisdiction. Rule 12(d) contemplates that a trial court entertaining a motion for dismissal under Fed.R.Civ.P. 12(b), and having before it the opponent's application for a hearing on the motion, will do one of two things: defer the motion to trial or hold a preliminary hearing on it. Again and again courts of appeal have remanded cases in which a trial judge took a third alternative, of ruling on a Rule 12(b) motion before trial without a hearing. These cases establish a clear rule: a motion to dismiss under Fed.R.Civ.P. 12(b) - and in particular a motion citing a jurisdictional defect under Fed.R.Civ.P. 12(b)(l) - requires a preliminary hearing or hearing at trial to determine any disputed facts upon which the motion or the opposition to it is predicated. *Augustine v. United States,* 704 F.2d 1074, 1079 (9th Cir. 1983) (12(b)(1) motion); *Martin v. Morgan Drive Away, Inc.*,665 F.2d 598, 602 n.1 (5th Cir. Unit A) (12(b)(1) motion), *cert. dismissed,* 458 U.S. 1122, 103 S.Ct. 5, 73 L.Ed.2d 1394 (1982); *Dougherty v. Harper's Magazine Co.,* 537 F.2d 758, 761 (3d Cir. 1976) (12(b)(6) motion); *Harmon v. Superior Court of Los Angeles,* 307 F.2d 796, 797 (9th Cir. 1962) (12(b)(1) motion); *Stauffer v. Exley,*184 F.2d 962, 967 (9th Cir. 1950) (jurisdictional facts disputed); *see* Wright & Miller, *5 Federal Practice and Procedure* § 1373 at 714 (1969). The standard to be applied in determining whether a hearing is required is equivalent to that used under Fed.R.Civ.P. 56(c), in ruling on a motion for summary judgment: that is, where genuine issues of material fact exist, they must be submitted to decision on the evidence. *Cook v. Providence Hosp.,* 820 F.2d 176, 178 (6th Cir. 1987); *Augustine,*704 F.2d at 1079. Only "where the facts are relatively simple, [and] substantially uncontroverted, and the law is not complex," is a district court justified in ruling on a motion under Fed.R.Civ.P. 12(b)(1) without pausing to make findings on disputed questions of fact. *Cook,*820 F.2d at 178.

[4] In this case the District Court ordered a hearing, but

proceeded to rule on the motion without convening the hearing or entering an order indicating why no hearing was necessary. We believe a hearing was required on each of three distinct elements of Commodities' due process claim.

1. *Continuing jurisdiction over previous orders of the District Court.* Commodities argues that the motions underlying this appeal are predicated on its allegation that, throughout the challenged course of conduct, Customs sought to ruin Commodities' business by bringing meritless or inflated assessments for liquidated damages in violation of the due process clause, and thus to evade the District Court's earlier order compelling it to allow Commodities to run a duty-free shop. Commodities' vice-president, also its general counsel, swore to these allegations in the petition for supplemental relief. The District Court therefore had before it proof of an evasion of a valid and binding court order, if the Court had found that this allegation was true, jurisdiction would arise from its own continuing jurisdiction, over the original dispute. We conclude that it was not enough for the District Court to reject the argument that the injunction sought here is supplemental to its prior orders without addressing these factual allegations in Commodities' petition. JA 182 n.5. We therefore remand this issue for factfinding and a ruling.

2. *Availability of protest procedure and thus of judicial review in the CIT.* We believe the District Court has not found sufficient facts for us to test the correctness of its unexplained conclusion that Commodities has access to administrative and CIT review by means of the protest procedure set forth at 19 U.S.C. §§ 1514, 1515 and at 19 C.F.R. § 174.

As we stated above, the protest procedure, if properly invoked, opens the door to the CIT for judicial review of a final, adverse decision by the Customs Service. Commodities cannot now file a protest, as it admits in its brief, because the

period of limitations applicable to protests has expired. 19 C.F.R. § 174.12(e). But if indeed Commodities at one time had access to the protest procedure to contest the liquidated damages claims in this case, it had the power to frame a case within the exclusive jurisdiction of the CIT. 28 U.S.C. § 1581(a). It would not be proper for the District Court to allow a party to evade Congress' unequivocal intention to make the CIT's jurisdiction exclusive, merely by waiting until the limitations period for protests had elapsed and then suing in district court. Thus, if Commodities had, but failed to avail itself of, the right to institute a timely protest, it should be held to have waived judicial review of its specific disputes over the liquidated damages assessments in this case. We construe the District Court's decision in this case to hold that such a waiver has occurred.

The District Court failed to examine two arguments which Commodities makes to show that it never had access to the protest procedure. Both present mixed questions of fact and law, so we remand them for hearing and full analysis below.

First, Commodities argues, liquidated damages assessments are not subject to protest at all. Because its attempt to resist those assessments is therefore not within the jurisdictional grant of 28 U.S.C. § 1581(a), and is not within any other grant of jurisdiction to the CIT, Commodities argues, the District Court retains jurisdiction of this matter. This is a fundamental due process claim, then, involving the. availability of judicial review over an agency's determination depriving a corporate person of property.

We believe Commodities, in making this argument, has raised a colorable claim under the due process clause. It is possible that an objection to liquidated damages on a duty-free shop's warehouse bond is not a "matter[ ] subject to protest." 19 C.F.R. § 174.11 (heading). The only plausible category in which such a dispute could fit is set forth at 19

U.S.C. § 1514(a)(3) and 19 C.F.R. § 174.11(c): "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." While the broadly sweeping language of this provision suggests that a liquidated damages assessment is subject to the protest procedure, Commodities argues that such an assessment is not a "charge or exaction" in the technical sense in which those terms are used in the Customs laws and regulations. As support for this argument, for instance, Commodities refers to 28 U.S.C. § 2637(a), which requires that a party wishing to file a protest must first prepay any "liquidated duties, charges or exactions" and which does not refer directly to liquidated damages. A similar argument has already been advanced in a prior case, *United States v. Utex Intl Inc.*,857 F.2d 1408 (Fed.Cir. 1988), but the court in that case ruled on other grounds. *Id.* at 1413-14. No case cited to us settles the specific question Commodities raises here, though our review of the cases interpreting 19 U.S.C. § 1514(a) and 19 C.F.R. § 174.11 indicates that the question whether a given action of the Secretary of the Treasury in the customs area is a protestable "charge or exaction" is by no means a foregone conclusion.

We conclude that Commodities raises a mixed question of fact and law when it asserts that its effort to resist the liquidated damages assessments involved in this case was not subject to protest and thus was never within the scope of CIT jurisdiction. The District Court, by failing to address this question, has provided neither the necessary factfinding nor an adequate application of the law to the facts. We therefore remand this question to the District Court for its factfinding and decision.

Second, Commodities argues that, even if the liquidated damages claims were protestable, Customs mislead it into thinking that the only available route for obtaining review was the petition procedure set forth at 19 C.F.R. § 172 and described in Section II above. Because it relied on Customs'

explicit directions that it must follow the petition procedure, and because Customs has engaged in lengthy delays in considering those petitions, the period of limitations for protests has long since elapsed. 19 C.F.R. § 174.12(e). Commodities thus asserts that Customs has made the protest procedure futile, taking affirmative steps that have had the effect of blocking Commodities' access to the CIT and depriving it of judicial review.

Here, again, Commodities raises a factual issue which, if decided in its favor, would give considerable color to its due process claim. Once again, we are confronted with a mixed question of fact and law, heretofore unresolved, which the District Court must reconsider on remand.

C. STATUTORY SOURCES OF JURISDICTION. In addition to its due process claim, Commodities makes several arguments seeking to found district court jurisdiction on statutory sources.

First, Commodities makes certain arguments founded on 28 U.S.C. § 1352 and 28 U.S.C. § 1355. The District Court nowhere rules on the application of these statutes to this case, for the simple reason that Commodities did not raise them below. R. 49, 51. Because these issues were not ruled on by the District Court, they are not subject to an appeal. Only because these are jurisdictional issues, we conclude that they are not waived and may be raised on remand.

Finally, Commodities argues that district court jurisdiction is founded on its FOIA requests, on the ground that district courts, not the CIT, have original jurisdiction in disputes under FOIA. 5 U.S.C. § 552(a)(4)(B). Customs successfully refutes these arguments by pointing out that Commodities' petition conditioned its prayer for enforcement of its FOIA requests on the District Court's actual grant of other relief. Commodities' allegations that Customs has illegally failed to

comply with FOIA requests may be relevant to its due process claim, as tending to prove the determination of officers in the Customs' Detroit office to harass Commodities. But jurisdiction over this case may not be founded solely on a prayer for additional relief conditioned on a complaint over which the court otherwise lacks jurisdiction.

IV. TRANSFER

The District Court denied Commodities' motion for transfer of this case to the CIT, pursuant to 28 U.S.C. § 1613, without specifying its reasons. It has been held an abuse of the district court's discretion under this statute for it to refuse to transfer without determining whether transfer would be "in the interest of justice." *Taylor v. Social Sec. Admin.*, 842 F.2d 232, 233 (9th Cir. 1988). Should the District Court conclude on remand, after a hearing and after detailing its findings and conclusions, that it lacks jurisdiction because of an exclusive jurisdictional power of the CIT, the Court shall proceed to give full consideration to any renewed motion for transfer filed by Commodities.

At oral argument counsel for Customs urged us, if we did not dismiss this appeal altogether, to remand this case to the District Court with an order that it shall transfer the case to the CIT for determination of the jurisdictional issues. We are unable to do so under the terms of § 1631. That statute permits a district court to transfer a case only after "find[ing] that there is a want of jurisdiction."

V. CONCLUSION

We vacate the judgment below and remand the jurisdictional questions arising from Commodities' due process claim, as set forth in Section III above, to the District Court, with no prejudice to any renewed motion for a transfer to the Court of International Trade under 28 U.S.C. § 1631, as set

forth in Section IV above.

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part.

I agree that the judgment of dismissal must be vacated and the case remanded to the district court. Regardless of the merits of Commodities' constitutional claim, however, I have difficulty understanding why the Court of International Trade does not almost certainly have exclusive jurisdiction of this action under 28 U.S.C. § 1581(i), and why the proper course for the district court to follow, on remand, would not almost certainly be to transfer the action to the Trade Court pursuant to 28 U.S.C. § 1631.

Under 28 U.S.C. § 1581(i), the Court of International Trade has "exclusive jurisdiction" over "any" civil action against the United States arising out of "any" federal law providing for, among other things, "(1) revenue from imports or tonnage; (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; ... (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) ...." Former Assistant Secretary of the Treasury Eugene Rossides says that § 1581(i) was "evidently designed to assure that the new court, rather than the district courts, takes jurisdiction of any justiciable action challenging the administration of laws affecting import trade." E. Rossides, *U.S. Import Trade Regulation* 537 (1986).

As far as I have been able to tell, Commodities can point to no facts the establishment of which would deprive the Court of International Trade of exclusive jurisdiction over the present case. It seems to me that the case clearly arises out of the administration and enforcement of laws dealing with imports of merchandise. If I am right in this, there is no need for an evidentiary hearing under Rule 12(d), Fed.R.-

Civ.P. And although the district court might well find oral argument beneficial, the rule itself does not require it; motions to dismiss are "heard" all the time on papers filed by the parties, just as this court often hears and determines appeals without oral argument.

The possibility that the district court may have exercised jurisdiction properly when this case was originally filed in 1976, before enactment of the current statutory scheme, does not change my view that Commodities' request for the relief it now seeks ought to be determined by the Court of International Trade. On the record before us, I see no reason why it would not be in the interest of justice to transfer the action to that court in accordance with the mandate of 28 U.S.C. § 1631. I agree that the question of a transfer under § 1631 needs to be addressed in the first instance by the district court, however, rather than, this court, and I believe our remand to the district court is appropriate for that reason. If the district court does not consider a transfer appropriate, it needs to say why.

733 F Supp 109 (CIT 1990)
No. 89-03-00144

United States Court of International Trade

UNITED STATES OF AMERICA,

Plaintiff,

V

COMMODITIES EXPORT CO. and
OLD REPUBLIC INSURANCE CO.,

Defendants,

Decided March 14, 1990

United States brought action on behalf of the Customs Service to recover unpaid liquidated damages from a duty--free shop and its surety in connection with an alleged breach of a warehouse bond. The Court of International Trade, Tsoucalas, J., held that action arose out of import transaction and warehouse bond related to importation of merchandise, as required for subject matter jurisdiction.

Ordered accordingly.

1. Customs Duties #84(1)

Court of International Trade, in action brought by United States Customs Service to recover unpaid liquidated damages for duty-free shop's alleged breach of warehouse bond, would not defer its decision as to whether it had jurisdiction until district court determined whether it had jurisdiction in action brought by defendant in district court; cases asked for separate and distinct relief and, if Court of International

Trade had jurisdiction, its jurisdiction would be exclusive. 28 U.S.C.A. § 1582(2).

2. Customs Duties #84(1)

Jurisdiction of Court of International Trade is exclusive and does not depend on assertion of jurisdiction by district court. 28 U.S.C.A. § 1582.

3. Customs Duties #87

Action to recover unpaid liquidated damages for duty-free shop's alleged breach of warehouse bond was properly characterized as arising out of "import transaction," as required for Court of International Trade to have subject matter jurisdiction; shop stored foreign-made goods in bonded warehouse and, as party liable for payment of customs duties and taxes in event that stored goods were injected into United States commerce in violation of bond, shop was rightly classified as "importer." 28 U.S.C.A. § 1582(2).

4. Customs Duties #87

Warehouse bond allegedly breached by duty-free shop which stored foreign-made goods at bonded warehouse was bond "relating to the importation of merchandise," as required for Court of International Trade to have jurisdiction over dispute arising out of alleged breach of bond, even though bond did not refer to importation; bond clearly was designed to deal with instances where duty-free goods had in fact entered into stream of commerce of United States without payment of appropriate duties and taxes. 28 U.S.C.A. § 1582(2).

Stuart M. Gerson, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S.

Department of Justice, and Mark S. Sochaczewsky, New York City, for plaintiff.

Lubienski, Lubienski & Lubienski, Walter H. Lubienski, Detroit, Mich., and Roger E. Craig, Naples, Fla., for defendants.

OPINION

TSOUCALAS, Judge:

Plaintiff brings this action on behalf of the United States Customs Service to recover unpaid liquidated damages in the amount of $6,293.96, plus interest, from defendants, Commodities Export Co. ("Commodities") and its surety, Old Republic Insurance Co. ("Old Republic").

The issue at hand is whether this Court has subject matter jurisdiction over a dispute arising out of an alleged breach of a warehouse bond by defendant, a duty-free shop. Plaintiff maintains the court has jurisdiction based on 28 U.S.C. § 1582 (2) (1982), which states in part:

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States -
>
> ...
>
> (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury;

Defendants contest subject matter jurisdiction, claiming the transaction in question is not an "import transaction" within the meaning of the statute because duty-free shops are not importers and do not engage in "import transactions."

Background

Commodities is a duty-free store which operates a private, Class 2, bonded warehouse as an essential part of its business. Bonded warehouses are used by duty-free stores to expedite the exportation of goods from the United States. Duty-free stores place goods in these warehouses and sell in export from their retail stores. Commodities sells both foreign and domestic goods. According to its submissions, foreign-made goods account for two-thirds (2/3) of the goods Commodities sells.

Commodities operates from a location across from the Ambassador Bridge in Detroit, Michigan. The bridge leads directly into Canada and Commodities sells goods to consumers going directly into Canada. If the goods leave the warehouse but do not go directly into Canada, they have entered the stream of commerce of the United States without any import duties having been paid on them as required by the laws of the United States. Such goods are known as "runaways." Because of this potential problem, Customs keeps a close watch on duty-free shops and traditionally controlled their recordkeeping. However, in 1982, Customs put duty-free stores on an "honor system" whereby the owners of the bonded warehouses would henceforth be responsible for the recordkeeping, subject to "spot checks" by Customs officials. To insure payment of duties and other charges due to runaways and other infractions, the owners of the warehouses are required to post with Customs a warehouse bond pursuant to 19 U.S.C. § 1555 (1988).[1]

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[1]19 U.S.C. § 1555(a) provides:

> ...Before any imported merchandise not finally released from customs custody shall be stored in any [bonded warehouse], the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit,

On December 1, 1982, Commodities and its surety, Old Republic, executed and delivered to Customs a Proprietors Warehouse Bond for Storage and Manipulation of Merchandise, Class 2 ("bond"), in accordance with 19 U.S.C. § 1555, in the amount of $50,000. Under the terms of the bond, defendants promised that for each failure to comply with the terms of the bond they would pay liquidated damages of $100.00. Additionally, if any merchandise was removed from the warehouse without Customs' approval, defendants would pay liquidated damages equal to five (5) times the duty and tax due on the goods. Bond, Condition 5(g). Defendants further agreed to notify Customs in writing by the close of business the next business day if they discovered any discrepancy in their merchandise. Bond, Condition 5(f). Further, defendants, in accordance with the provisions of the bond, agreed to "[m]ark each package with the correct general order number, warehouse entry number, or seizure number and the corresponding date" and to segregate them by such number. Bond, Conditions 2(b)(c) and (d).

On February 22, 1983, Customs officials conducted a "spot check" inspection of Commodities' warehouse and found a number of irregularities. The inspectors discovered that thirty seven (37) warehouse entries were not marked properly, and seven (7) entries contained shortages. These were held to constitute defaults under Conditions 2(b) and 5(g) of the bond, respectively.

Customs subsequently demanded payment of liquidated damages as provided for in the bond. The amount assessed against Commodities was $6,293.96, the amount at issue in this case. Customs repeatedly issued bills for the sum to Commodities and later to its surety, Old Republic. No payment was ever received for this amount, nor was a protest

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storage, or manipulation of merchandise in such warehouse.

filed under 19 U.S.C. § 1514 (1988).[2]

On March 29, 1988, Commodities petitioned the United States District Court for the Eastern District of Michigan for injunctive relief against the liquidated damage claims assessed by Customs. The District Court granted Customs' motion to dismiss the case on the basis that the Court of International Trade has exclusive jurisdiction over the contested issues.[3]

On March 17, 1989, Customs commenced this action to recover unpaid liquidated damages in the amount of $6,293.-96, plus interest. Defendants contest this Court's subject matter jurisdiction on the basis of their claim that, as a duty-free store, they are not importers, they do not engage in import transactions and thus they cannot be sued in this Court under 28 U.S.C. § 1582(2). They also assert that since the District Court may yet decide it has jurisdiction over the case brought by Commodities, this Court should refrain from exercising its jurisdiction.

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[2]The relevant provisions of 19 U.S.C. § 1514 provide that decisions of the appropriate customs officers regarding, *inter alia*,

> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> ...
>
> shall be final and conclusive...unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade....

[3]The United States Court of Appeals for the Sixth Circuit vacated the judgment of the District Court and remanded the case for further consideration of a number of issues, including a due process argument made by Commodities. *Commodities Export Co. v. United States Customs Service*, 888 F.2d 431 (1989). The District Court has not yet issued its decision on remand.

Discussion

[1] Defendants argue that this Court should await the outcome of the District Court case. The Court disagrees. The two cases, one brought by Commodities in the District Court and one brought by Customs in this Court, ask for separate and distinct relief. The Court of International Trade has exclusive jurisdiction for actions brought by the United States based on 28 U.S.C. § 1582(2) and need not defer its decision since the District Court cannot have jurisdiction where this Court does. *Vivitar Corp. v. United States*, 761 F.2d 1552, 1559 (Fed.Cir. 1985), *cert. denied*, 474 U.S. 1055, 106 S. Ct. 791, 88 L.Ed.2d 769 (1986).

[2] The jurisdiction of the Court of International Trade is exclusive and does not depend on the assertion of jurisdiction by the district courts. *Id.* Our appellate court has held that "it is faulty analysis to look first to the jurisdiction of the district courts to determine whether the CIT has jurisdiction." *Id.* Since the CIT's jurisdiction is narrower than the district courts', "[t]he focus must be solely on whether the claim falls within the language and intent of the jurisdictional grant *to* the CIT." *Id.* at 1559-60 (emphasis in original). Otherwise, the district courts would always have jurisdiction, even where Congress clearly intended to give jurisdiction to the CIT. *Id.* at 1559.

Actions on bonds executed under United States laws generally are heard by the district courts or state courts. 28 U.S.C. § 1352 (1982). The sole exception to this rule is the exclusive jurisdiction of the Court of International Trade under 28 U.S.C. § 1582. That section provides for the CIT to hear civil actions which arise out of import transactions and which are commenced by the United States to, *inter alia*, "recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury." 28 U.S.C. § 1582(2). Hence, a

number of statutory requirements must be satisfied for this Court to retain such jurisdiction.

[3] First, the action must be a civil action that arises out of an import transaction. Second, the action must be commenced by the United States. Third, the action must be commenced to collect on a bond relating to the importation of merchandise. As the case before this Court was commenced by the United States, the second requirement is satisfied; defendants acknowledge this. *Defendants Special Appearance and Motion to Dismiss for Lack of Subject Matter Jurisdiction* at 3 ("Defendants' Motion to Dismiss"). Thus, the only questions before this Court are whether the action arose out of an import transaction and whether the warehouse bond related to the importation of merchandise.[4]

Defendants argue that this action did not arise out of an import transaction and that the bond did not relate to the importation of merchandise. *Defendants' Motion to Dismiss* at 3. Though they stored foreign-made goods in their bonded warehouse, defendants claim that, as duty-free merchants, they cannot be classified as importers and their dealings cannot be characterized as "import transactions," since they operate "exclusively in *export.*" *Id.* (emphasis in original).

The trade statutes provide no explicit definitions for "importation" and "import transaction." However, the regulations promulgated by the Treasury Department give two definitions for "date of importation" depending on whether

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[4]Defendants contest the validity of the bond, alleging that Customs has not produced powers of attorney to bind Commodities to the attorneys-in-fact who signed the bond and, as a result the Court should grant defendants' motion to dismiss. *Defendants' Special Appearance and Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction* at 4. The Court need not rule on the validity of the signatures at this time. Since Customs has brought this action to collect on a bond, that part of 28 U.S.C. § 1582 is satisfied.

the merchandise arrives in the United States by vessel or by other means. 19 C.F.R. § 101.1(h) (1989). If it arrives by vessel, the merchandise is deemed imported on "the date on which the vessel arrives within the limits of a port in the United States with intent then and there to unlade such merchandise." *Id.* If it arrives by another mode, the merchandise is considered imported on "the date on which the merchandise arrives within the Customs territory of the United States." *Id.*

In interpreting the trade laws, courts frequently have relied on the ordinary meaning of "importation." *Cunard Steamship Co. v. Mellon,* 262 U.S. 100, 121, 43 S. Ct. 504, 506, 67 L.Ed. 894 (1923); *Kee Co. v. United States,* 13 CCPA 105, 109, T.D. 40943 (1925); *Sterling Bronze Co. v. United States,* 12 CCPA 338, 340, T.D. 40487 (1924). *Black's Law Dictionary* defines importation as "the act of bringing goods and merchandise into a country from a foreign country." *Black's Law Dictionary* at 680 (5th Ed. 1979). Justice Van Devanter expanded on this definition in *Cunard.* He wrote that importation

> consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.

Cunard, 262 U.S. at 122, 43 S.Ct. at 507.

Defendants note in their motion to dismiss that the storage of dutiable, foreign-made merchandise in a bonded warehouse, by itself, does not constitute importation into the United States. *Defendants' Motion to Dismiss* at 4. The predecessor to our appellate court long ago stated that "goods in bonded warehouses are not to be considered as imported until a permit of delivery has been issued and they enter into the commerce of the country." *Stone and Downer v. United*

States, 19 CCPA 259, 264, T.D. 45388 (1931) (citations omitted); *cert. denied,* 287 U.S. 619, 53 S. Ct. 20 (1932).

However, the Supreme Court tacitly acknowledged that foreign-made goods in Customs warehouses are imports when it wrote that "*imports* may be stored duty-free for prescribed periods" in bonded warehouses. *Xerox Corp. v. County of Harris, Texas,* 459 U.S.145, 150, 103 S.Ct. 523, 526, 74 L.Ed.2d 323 (1982) (emphasis added). This concept was restated in *R.J. Reynolds Tobacco Co. v. Durham County, North Carolina,* in which the Supreme Court dealt with the issue of foreign-made goods stored in Customs bonded warehouses under 19 U.S.C. § 1555. 479 U.S. 130, 107 S. Ct. 499, 93 L.Ed.2d 449 (1986). Referring to goods stored in a Class 2 warehouse, as the goods in the instant case were, the Court inferred that such goods are importations, but simply are not subject to duties unless withdrawn from the warehouse and injected into the stream of commerce of the United States. *Id.* at 133-34, 107 S. Ct. at 503. Hence, while the Supreme Court has not explicitly held that foreign-made goods in bonded warehouses are imports, the implication that they are is quite clear.

Additionally, in *United States v. John V. Carr & Son, Inc.,* the Customs Court defined imported merchandise as

> *merchandise* that has been brought within the limits of a port of entry *from a foreign country* with intention to unlade, and the word *'importation'* as used in tariff statutes, unless otherwise limited, means merchandise to which that condition or status has attached.

58 Cust. Ct. 809, 813, 266 F. Supp. 175, 178 (1967) (emphasis in original), *aff'd,* 396 F.2d. 1017, 55 CCPA 111, 396 F.2d 1017 (1968), quoting *Porto Rico Brokerage Co. v. United States,* 76 F.2d 605, 23 CCPA 16, T.D. 47672 (1935); and *Procter & Gamble Mfg. Co. v. United States,* 19 CCPA

415, T.D. 45678 (1932). This Court has adopted Webster's definition for the term "unlade." *American Mail Line v. United States*, 6 Cust. Ct. 90, 93, C.D. 435 (1941). It was held to mean "to take the load from; to take out the cargo of; as to unlade a ship." *Id.*, quoting Webster's *New International Dictionary*. Thus, once goods are within the jurisdictional limits of the United States with the intent to discharge, they are imports under this definition.[5] As the goods in this action had already passed into the bonded warehouse, they were well beyond that point.[6]

Defendants argue that they are entitled to special treatment because they are a duty-free store and do not bring goods into the United States for the purpose of injecting them into the stream of commerce. *Defendants' Motion to Dismiss* at 5. They recognize this Court's jurisdiction over actions brought by Customs to collect liquidated damages on an import bond. But they claim that such is not this case because as a duty-free store they are not importers, and the bond is not an "importation bond" subject to CIT jurisdiction under 28 U.S.C. § 1582. *Id.*

The Omnibus Trade and Competitiveness Act of 1988 defines duty-free enterprise as

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[5]Our appellate court's predecessor has held that "unless the contrary clearly appears," an importation is "the bringing of goods within the jurisdictional limits of the United States with the intention to unlade them." *Henry Hollander Co. v. United States*, 22 CCPA 645, 648, T.D. 47632 (1935). See also *Sherwin-Williams Co. v. United States*, 38 CCPA 13, 18 (1950); *American Customs Brokerage Co. v. United States*, 72 Cust. Ct. 245, 253, C.D. 4546, 375 F. Supp. 1360, 1366 (1974).

[6]That is not to say, however, that the goods were subject to duty or tax while in the bonded warehouse. Though technically "imports," foreign-made goods in a bonded warehouse remain exempt from duties and taxes until either they are withdrawn (as has been alleged here) or five years pass from the date of importation. 19 U.S.C. § 1557(a) (1988).

> a person that sells, for use outside the customs territory, duty-free merchandise that is delivered from a bonded warehouse to an...exit point for exportation by, or on behalf of, individuals departing from the customs territory.

19 U.S.C. § 1555(b)(8)(D) (1988). Duty-free merchandise is defined as goods on which no Federal duty or tax has been charged "pending exportation from the customs territory." 19 U.S.C. § 1555(b)(8)(E). The unique nature of a duty-free store is that it sells goods for immediate export from the United States so that its customers need not pay Federal duties and taxes on the goods. There is no mention, however, in either the statutes or accompanying regulations that duty-free establishments are not importers, nor that the goods are not imports while in the warehouse. Logic dictates that before one can export foreign goods from the United States, they must first be imported.

The regulations interpreting the trade statutes define "importer" as "the person primarily liable for the payment of any duties on the merchandise, or an authorized agent acting on his behalf." 19 C.F.R § 101.1(1) (1989). The statute, regulations and caselaw unequivocally state that if goods held in a bonded warehouse prior to payment of duties and taxes are removed from the warehouse and enter into the stream of commerce of the United States, duties and taxes become due. 19 U.S. C. § 1557(a); 19 C.F.R. § 113.62(a)(ii) (1989); *R.J. Reynolds,* 479 U.S. at 134, 107 S. Ct. at 503; *Xerox,* 459 U.S. at 150, 103 S. Ct. at 526. If such duties and taxes become due on goods stored in Commodities' bonded warehouse because of their injection into the United States commerce in violation of their warehouse bond with Customs, Commodities or its surety would be liable to pay the duties and taxes, as well as any liquidated damages provided for in the bond. As the party liable for payment of Customs duties and taxes, Commodities is rightly classified as an importer. 19 C.F.R. § 101.1(1).

[4] Defendants assert that, since the bond does not refer to importation, it could not logically be a bond "relating to the importation of merchandise." *Defendants' Motion to Dismiss* at 5-6. In *R.J. Reynolds*, the Supreme Court stated that "the central purpose behind customs-bonded warehouses [is] to ensure that federal customs duties are collected." 479 U.S. at 131, 107 S. Ct. at 502. While the bond is not entitled "importation bond," and does not refer to the importation of merchandise, it clearly was designed to deal with instances where duty-free goods have in fact entered into the stream of commerce of the United States without payment of the appropriate duties and taxes. As such, the bond related to the importation of merchandise.

The terms of the bond provide for liquidated damages where merchandise enters the country in violation of the bond. Customs here is seeking to recover unpaid liquidated damages assessed by them because of alleged shortages at the warehouse which Customs claims entered the stream of commerce of the United States. The bond details the parties' obligations regarding merchandise held in Customs bonded warehouses. When Customs believes the goods entered the stream of commerce (or the bond was otherwise violated), Customs is entitled to assess liquidated damages; if they remain unpaid or defendants challenge the assessment, Customs may seek payment in this Court. Duty-free establishments are exempt from duties and taxes so long as they comply with the terms and conditions of their warehouse bond; they are not, however, exempt from the jurisdiction of this Court.

Conclusion

Accordingly, defendants' motion to dismiss for lack of subject matter jurisdiction is hereby denied. Having decided the jurisdictional issue, the Court hereby denies defendants' motion for reconsideration. Defendants' motion for certifica-

tion is also denied pending a final decision on the merits.

No. 90-2308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMODITIES EXPORT CO.,
Plaintiff-Appellant,

V

U.S. CUSTOMS SERVICE,
Defendant-Appellee,

ORDER

Filed March 30, 1992.

Before: MERRITT, Chief Judge; NELSON, Circuit Judge; and CELEBREZZE, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

§ 1514. Protest against decision of appropriate customs officer

(a) Finality of decisions; return of papers

Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to-

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;

(5) the liquidation or reliquidation of an entry, or any modification thereof;

(6) the refusal to pay a claim for drawback; and

(7) the refusal to reliquidate an entry under section 1520(c) of this title,

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title. When a judgment or order of the United States Court of International Trade has become final, the papers transmitted shall be returned,

together with a copy of the judgment or order to the appropriate customs officer, who shall take action accordingly.

(b) Finality and conclusiveness of customs officer's determinations

With respect to determinations made under section 1303 of this title or subtitle IV of this chapter which are reviewable under section 1516a of this title, determinations of the appropriate customs officer are final and conclusive upon all persons (including the United States and any officer thereof) unless a civil action contesting a determination listed in section 1516a of this title is commenced in the United States Court of International Trade, or review by a binational panel of a determination to which section 1516a(g)(2) of this title applies is commenced pursuant to section 1516a(g) of this title and article 1904 of the United States-Canada Free-Trade Agreement.

(c) Form, number, and amendment of protest; filing of protest

(1) A protest of a decision under subsection (a) of this section shall be filed in writing with the appropriate customs officer designated in regulations prescribed by the Secretary, setting forth distinctly and specifically each decision described in subsection (a) of this section as to which protest is made; each category of merchandise affected by each such decision as to which protest is made; and the nature of each objection and reasons therefor. Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. In addition, separate protests filed by different authorized persons with respect to any one category of merchandise that is the subject of a protest are deemed to be part of a single protest. A protest may be amended, under regulations prescribed by the Secretary, to set

forth objections as to a decision or decisions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. New grounds in support of objections raised by a valid protest or amendment thereto may be presented for consideration in connection with the review of such protest pursuant to section 1515 of this title at any time prior to the disposition of the protest in accordance with that section. Except as provided in sections 1485(d) and 1557(b) of this title, protests may be filed with respect to merchandise which is the subject of a decision specified in subsection (a) of this section by-

(A) the importers or consignees shown on the entry papers, or their sureties;

(B) any person paying any charge or exaction;

(C) any person seeking entry or delivery;

(D) any person filing a claim for drawback; or

(E) any authorized agent of any of the persons described in clauses (A) through (D).

(2) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before-

(A) notice of liquidation or reliquidation, or

(B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

A protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of notice of demand for payment against its bond. If another party has not filed a timely protest, the surety's protest shall certify that it is not being filed collusively to extend another authorized person's time to protest as specified in this subsection.

(d) Limitation on protest of reliquidation

The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the customs officer upon any question not involved in such reliquidation.

(June 17, 1930, c. 497, Title IV, § 514, 46 Stat. 734; June 2, 1970, Pub.L. 91-271, Title II, § 207, 84 Stat. 284; July 26, 1979, Pub.L. 96-39, Title X, § 1001(b)(3), 93 Stat. 305; Oct. 10, 1980, Pub.L. 96-417, Title VI, §§ 601(5), 605, 94 Stat. 1744; Oct. 30, 1984, Pub.L. 98-573, Title VI, § 612(b)(1), 98 Stat. 3034; Oct. 22, 1986, Pub.L. 99-514, Title XVIII, § 1888(4), 100 Stat. 2924; Sept. 28, 1988, Pub.L. 100-449, Title IV, § 403(b), 102 Stat. 1884.)

§ 1515. Review of protests; administrative review and modification of decisions; request for accelerated disposition of protest

(a) Unless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part. Thereafter, any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded and any drawback found due shall be paid. Upon the request of the protesting party, filed within the time allowed for the filing of a protest under section 1514 of this title, a protest may be subject to further review by another appropriate customs officer, under the circumstances and in the form and manner that may be prescribed by the Secretary in regulations, but subject to the two-year limitation prescribed in the first sentence of this subsection. Notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary. Such notice shall include a statement of the reasons for the

denial, as well as a statement informing the protesting party of his right to file a civil action contesting the denial of a protest under section 1514 of this title.

(b) A request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed by certified or registered mail to the appropriate customs officer any time after ninety days following the filing of such protest. For purposes of section 1581 of Title 28, a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request.

(As amended Oct. 10, 1980, Pub.L. 96-417, Title VI, § 606, 94 Stat. 1745.)

§ 1555. Bonded warehouses

(a) Designation; preconditions; bonding requirements; supervision

Subject to subsection (b) of this section, buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the appropriate customs officer, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the

owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse.

(b) Duty-free sales enterprises

(1) Duty-free sales enterprises may sell and deliver for export from the customs territory duty-free merchandise in accordance with this subsection and such regulations as the Secretary may prescribe to carry out this subsection.

(2) A duty-free sales enterprise may be located anywhere within-

(A) the same port of entry, as established under section 1 of the Act of August 24, 1912 (37 Stat. 434), from which a purchaser of duty-free merchandise departs the customs territory; or

(B) 25 statute miles from the exit point through which the purchaser of duty-free merchandise will depart the customs territory.

(3) Each duty-free sales enterprise-

(A) shall establish procedures to provide reasonable assurance that duty-free merchandise sold by the enterprise will be exported from the customs territory;

(B) if the duty-free sales enterprise is an airport store, shall establish and enforce, in accordance with such regulations as the Secretary may prescribe, restrictions on the sale of duty-free merchandise to any one individual to personal use quantities;

(C) shall display in prominent places within its place of business notices which state clearly that any duty-free merchandise purchased from the enterprise-

(i) has not been subject to any Federal duty or tax,

(ii) if brought back into the customs territory, must be declared and is subject to Federal duty and tax, and

(iii) is subject to the customs laws and regulation of any foreign country to which it is taken;

(D) shall not be required to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate that the items were sold by a duty-free sales enterprise, unless the Secretary finds a pattern in which such items are being brought back into the customs territory without declaration;

(E) may unpack merchandise into saleable units after it has been entered from warehouse and placed in a duty-free sales enterprise, without requirement of further permits; and

(F) shall deliver duty-free merchandise-

(i) in the case of a duty-free sales enterprise that is an airport store-

(I) to the purchaser (or a family member or companion traveling with the purchaser) in an area that is within the airport and to which access to passengers is restricted to those departing from the customs territory;

(II) to the purchaser (or a family member or companion traveling with the purchaser) at the exit point of a specific departing flight;

(III) by placing the merchandise within the aircraft on which the purchaser will depart for carriage as passenger baggage; or

(IV) if the duty-free sales enterprise has made a good faith effort to effect delivery for exportation through one of the methods described in subclause (I), (II), or (III) but is unable to do so, by any other reasonable method to effect delivery; or

(ii) in the case of a duty-free sales enterprise that is a border store-

(I) at a merchandise storage location at or beyond the exit point; or

(II) at any location approved by the Secretary before the date of enactment of the Omnibus Trade Act of 1987.

(4) If a State or local or other governmental authority, incident to its jurisdiction over any airport, seaport, or other exit point facility, requires that a concession or other form of approval be obtained from that authority with respect to the operation of a duty-free sales enterprise under which mer-

chandise is delivered to or through such facility for exportation, merchandise incident to such operation may not be withdrawn from a bonded warehouse and transferred to or through such facility unless the operator of the duty-free sales enterprise demonstrates to the Secretary that the concession or approval required for the enterprise has been obtained.

(5) This subsection does not prohibit a duty-free sales enterprise from offering for sale and delivering to, or on behalf of, individuals departing from the customs territory merchandise other than duty-free merchandise, except that such other merchandise may not be stored in a bonded warehouse facility other than a bonded facility used for retail sales.

(6) Merchandise that is purchased in a duty-free sales enterprise is not eligible for exemption from duty under subchapter IV of chapter 98 of the Harmonized Tariff Schedule of the United States if such merchandise is brought back to the customs territory.

(7) The Secretary shall by regulation establish a separate class of bonded warehouses for duty-free sales enterprises. Regulations issued to carry out this paragraph shall take into account the unique characteristics of the different types of duty-free sales enterprises.

(8) For purposes of this subsection-

(A) The term "airport store" means a duty-free sales enterprise which delivers merchandise to, or on behalf of, individuals departing from the customs territory from an international airport located within the customs territory.

(B) The term "border store" means a duty-free sales enterprise which delivers merchandise to, or on behalf of, individuals departing from, the customs territory through a

land or water border by a means of conveyance other than an aircraft.

(C) The term "customs territory" means the customs territory of the United States and foreign trade zones.

(D) The term "duty-free sales enterprise" means a person that sells, for use outside the customs territory, duty-free merchandise that is delivered from a bonded warehouse to an airport or other exit point for exportation by, or on behalf of, individuals departing from the customs territory.

(E) The term "duty-free merchandise" means merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory.

(F) The term "exit point" means the area in close proximity to an actual exit for departing from the customs territory, including the gate holding area in the case of an airport, but only if there is reasonable assurance that duty-free merchandise delivered in the gate holding area will be exported from the customs territory.

(G) The term "personal use quantities" means quantities that are only suitable for uses other than resale, and includes reasonable quantities for household or family consumption as well as for gifts to others.

(As amended Oct. 30, 1984, Pub.L. 98-573, Title II, § 211, 98 Stat. 2977; Aug. 23, 1988, Pub.L. 100-418, Title I, § 1908(b), 102 Stat. 1315; Aug. 20, 1990, Pub.L. 101-382, Title 1, § 139(a)(1), 104 Stat. 653.)

§ 1581. Civil actions against the United States and agencies and officers thereof

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review-

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under

section 305(b)(1) of the Trade Agreements Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review-

(1) any decision of the Secretary of the Treasury to deny a customs broker's license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customs broker's permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act; and

(2) any decision of the Secretary of the Treasury to revoke or suspend a customs broker's license or permit, or impose a monetary penalty in lieu thereof, under section 641(d)(2)(B) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this

section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officer's, that arises out of any law of the United States providing for-

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (l)-(3) of this subsection and subsections (a)-(h) of this section.

This subsection shall not confer jurisdiction over an anti-dumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the United States-Canada Free--Trade Agreement and section 516A(g) of the Tariff Act of 1930.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

(Added Pub.L. 96-417, Title II, § 201, Oct. 10, 1980, 94 Stat. 1728, and amended Pub.L. 98-573, Title II, § 212(b)-(1), Oct. 30, 1984, 98 Stat. 2983; Pub.L. 99-514, Title XVIII, § 1891(1), Oct. 22, 1986, 100 Stat. 2926; Pub.L. 100-449, Title IV, § 402(a), Sept. 28, 1988, 102 Stat. 1883.)

§ 1582. Civil actions commenced by the United States

The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States-

(1) to recover a civil penalty under section 592, 641-(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;

(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or

(3) to recover customs duties.

(Added Pub.L. 96-417, Title II, § 201, Oct. 10, 1980, 94 Stat. 1729, and amended Pub.L. 98-573, Title II, § 212(b)(2), Oct. 30, 1984, 98 Stat. 2983; Pub.L. 99-514, Title XVIII, § 1891(2), Oct. 22, 1986, 100 Stat. 2926.)

Subpart B-Protests

§ 174.11 Matters subject to protest.

The following decisions of the district director, including the legality of all orders and findings entering into the same, may be protested under the provisions of section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514):

(a) The appraised value of merchandise;

(b) The classification and rate and amount of duties chargeable;

(c) All charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(d) The exclusion of merchandise from entry or delivery

under any provision of the Customs laws;

(e) The liquidation or reliquidation of an entry, or any modification thereof;

(f) The refusal to pay a claim for drawback; and

(g) The refusal to reliquidate an entry under section 520(c), Tariff Act of 1930, as amended (19 U.S.C. 1520(c)).

§ 174.12 Filing of protests.

(a) *By whom filed.* Protests may be filed by:

(1) The importer or consignee shown on the entry papers, or their sureties;

(2) Any person paying any charge or exaction;

(3) Any person seeking entry or delivery;

(4) Any person filing a claim for drawback; or

(5) Any authorized agent of any of the persons described in paragraphs (a) (1) through (4) of this section, subject to the provisions of § 174.3.

(b) *Form and number of copies.* Protests against decisions of a district director shall be filed in quadruplicate on Customs Form 19 or a form of the same size clearly labeled "Protest" and setting forth the same content in its entirety, in the same order, addressed to the district director. All schedules or other attachments to a protest (other than samples or similar exhibits) shall also be filed in quadruplicate.

(c) *Signature.* The protest shall be signed by the person filing the protest, or his agent, or attorney. If the person filing is not the importer of record or consignee, he shall include his address and importer number, if any.

(d) *Place of filing.* Protests shall be filed with the district director whose decision is protested except that, when the entry underlying the decision protested is filed at a port other than the district headquarters, the protest may be filed with the port director at that port.

(e) *Time of filing.* Protests shall be filed, in accordance

with section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), within 90 days after either:

(1) The date of notice of liquidation or reliquidation in accordance with §§ 159.9 or 159. 10 of this chapter;

(2) The date of the decision, involving neither a liquidation nor reliquidation, as to which the protest is made (e.g., the date of an exaction, the date of written notice excluding merchandise from entry or delivery under any provision of the Customs laws or the date of a refusal to reliquidate under section 520(c)(1) of the Tariff Act of 1930, as amended); or

(3) The date of mailing of notice of demand for payment against a bond in the case of a surety which has an unsatisfied legal claim under a bond written by the surety.

(f) *Date of filing.* The date on which a protest is received by the Customs officer with whom it is required to be filed shall be deemed the date on which it is filed.

(g) *Return of fifth copy.* If a fifth copy of the protest is presented for the purpose of having recorded thereon the date of its receipt and the protest number assigned thereto, such information shall be recorded thereon and the fifth copy shall be returned to the person filing the protest.

[T.D. 70-181, 35 FR 13429, Aug. 22, 1970, as amended by T.D. 71-15, 36 FR 778, Jan. 16, 1971; 36 FR 1058, Jan. 22, 1971; T.D. 73-175, 38 FR 17488, July 2, 1973; T.D. 80-271, 45 FR 75642, Nov. 17, 1980]

Supreme Court, U.S.
FILED
JUL 9 1992
OFFICE OF THE CLERK

No. 91-2063

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMODITIES EXPORT CO.,

Petitioner,

V

U.S. CUSTOMS SERVICE,

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Opinion of United States District Court Eastern District of Michigan, Southern Division

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Dated: July 9, 1992

BEST AVAILABLE COPY

No. 76-72292

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COMMODITIES EXPORT CO.,

Plaintiff,

V

U.S. CUSTOMS SERVICE,

Defendant.

Argued October 11, 1990

Decided November 13, 1990

MEMORANDUM OPINION AND ORDER

At a session of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 13th day of November, 1990.

Present: The Honorable Lawrence P. Zatkoff
United States District Judge

This matter is before the Court on motion of the defendant, U.S. Customs Service, to dismiss plaintiff's Amended Petition for Supplemental Relief. This matter has been thoroughly briefed by both parties and is ready for review.

BACKGROUND

Plaintiff, Commodities Export, operates a duty-free shop in

Detroit, Michigan near the entrance to the Ambassador Bridge. The bridge connects the United States and Canada between Detroit and Windsor, Ontario. Commodities is a truly unique duty-free shop in that it is not beyond the point of no return. The point of no return is the point at which a customer carrying goods recently purchased from the duty-free shop must take them through a customs checkpoint in order to bring them into the United States. After purchasing goods at Commodities, customers may either cross the bridge into Canada, or stay in Detroit. Upon crossing the bridge, customers of Commodities are obviously forced to go through a customs checkpoint prior to entering the United States with the goods purchased. Customers who fail to cross the bridge do not go through a customs checkpoint. Because of Commodities' unusual location, there existed a heightened risk of runaways. Runaways are goods that have been sold at a duty-free shop without taxes and duties, but which never leave the United States as required.

In 1976, Commodities obtained a court order in the district court commanding Customs to allow Commodities to operate its unique duty-free shop outside the point of no return. The order specified that surveillance and maintenance of the customs laws would be insured by putting a person on top of the Commodities duty-free shop in order to watch for runaways. In 1985, that court order was amended pursuant to an agreement between the parties allowing Commodities to comply with the customs laws, less expensively, by videotaping its operations.

Since the original court order in 1976, Customs has brought numerous assessments for liquidated damages against Commodities' warehouse bond. Commodities is required by law to maintain that bond to guarantee its compliance with the regulations for storing merchandise in and withdrawing it from a bonded warehouse. The Secretary of the Treasury is authorized to affix penalties to breaches of the conditions of

the bond and in particular, may access liquidated damages on the bond.

Under this authority, the Customs Service has notified Commodities of more than 20 assessments for liquidated damages. These damages are specifically based upon inventory shortages#, failure to mark certain goods in accordance with regulations, inadequate record keeping, inadequate marking of merchandise, unreported shortages and unreported breakage. An assessment was also issued for the total price of goods sold during a gap in the videotape of Commodities, operations which occurred on May 21, 1987.[1] Commodities has contested these liquidated damages and has asserted defenses to each claim. In 1988, Commodities filed a petition for supplemental relief in this court alleging that these damage assessments were an attempt by Customs to put Commodities out of business despite this Court's 1977 order. Commodities sought injunctive relief from the assessments. Commodities claimed it had done everything required of it in order to obtain review of the assessments. According to Commodities, Customs ignored all pleas for due process and instead, proceeded to enforce the claims without administrative review.

Judge Philip Pratt dismissed Commodities' suit for lack of jurisdiction.[2] That decision was remanded by the Sixth Circuit Court of Appeals. The Court of Appeals indicated that due process claims asserted by Commodities raised genuine issues of material fact entitling it to a hearing. The Sixth Circuit ordered a more thorough review of this matter

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[1]The record indicates that runaways account for approximately one-tenth of one percent of Commodities' total sales. However, the liquidated damages assessment was for the price of all the goods sold during the gap in the tape.

[2]The case was transferred to this Court's docket after Judge Pratt's death.

to determine whether facts existed to support Commodities, due process claims. Specifically, the Sixth Circuit has remanded this case for a hearing in order to resolve three issues. Firstly, whether Customs violated this court's previous order, compelling it to allow Commodities to run a duty-free shop, by seeking to ruin Commodities' business through the bringing of meritless or inflated assessments for liquidated damages in violation of the due process clause. Secondly, whether liquidated damages assessments are subject to the protest procedure set forth at 19 U.S.C. §1514, 1515 and at 19 C.F.R. §174. Thirdly, whether assuming liquidated damages are protestable, Customs misled Commodities into thinking that the only available route for obtaining review was the petition procedure under 19 C.F.R. §172.

A hearing in this matter was held October 11, 1990. This Court heard argument, but received no testimony. During the hearing, Customs agreed that protest procedures are no longer required to contest an assessment. Therefore, the issue of whether liquidated damage assessments are subject to the protest procedures set forth at 19 U.S.C. §§1514, 1515 and at 19 C.F.R. §174 is now moot. Accordingly, this Court will not address that issue.

OPINION

For the reasons which follow, this Court hereby GRANTS defendant's motion to dismiss.

I.

A.

Customs claims that this Court does not have jurisdiction over this matter because Customs is not attempting to violate this Court's previous orders. Customs claims that all of its liquidated damage assessments have been lawful and are reasonable. According to Customs, these assessments are set

by the conditions of the bond and are not set or assessed in an arbitrary fashion. Customs also asserts that these liquidated damages assessments are merited. According to Customs, the damage assessments have been based upon Commodities' failure to keep appropriate records, or properly mark and store merchandise. According to Customs, these failures on behalf of Commodities, violated the policy and procedure manual which sets forth standards Commodities should have followed. Customs has characterized the Commodities, bond as a contract between two parties which allows for breach damages. According to Customs, Commodities has breached the contract and, therefore, has been assessed liquidated damages. While Commodities has claimed it has not breached the contract, Customs claims that it has a valid factual basis for the assessment of liquidated damages.

Commodities submits that this Court has subject matter jurisdiction over this case because Customs is, in fact, trying to disobey this Court's previous order. According to Commodities, its status as the only duty-free shop not beyond the point of no return is a status which is unacceptable to Customs. Commodities claims that Customs is trying to disobey this Court's previous order by assessing outrageous and meritless liquidated damages claims in an effort to put Commodities out of business. Commodities claims the number and amount of these liquidated damage assessments is unprecedented throughout the nation.

Commodities asserts that, in fact, evidence exists which indicates that Customs has attempted to put Commodities out of business. Commodities submits there is no valid or reasonable factual basis for the liquidated damage assessments of Customs. According to Commodities, any allegations that it has violated the policy and procedure manual is actually a pretext to Customs' effort to force Commodities out of business. Commodities claims that the policy and procedure manual is not regulation. According to Commodi-

ties, Customs has even informed Congress of the fact that the manual does not contain regulations, but merely policies and procedures which are not binding on anyone. (Commodities' Answer to Motion to Dismiss, Exhibit, pp. 74-75). Of the approximately $170,000 in bond liquidated damages pending before this Court, Commodities asserts that $136,200 are based on Customs' Policy and Procedure Manual.

Commodities also submits that Customs has indirectly attempted to put Commodities out of business by writing threatening letters to Commodities' surety, Old Republic, demanding it to pay the liquidated damages claims assessed against Commodities. According to Commodities, these threats have jeopardized Commodities, ability to maintain a bond and keep a surety. If it loses Old Republic, Commodities claims it will be unable to find another surety. In addition, Commodities has alleged that these liquidated damages have placed its credit rating in jeopardy. At every stage, Commodities claims that it has contested the assessed liquidated damage claims and has asked for a hearing. According to Commodities, Customs has ignored these requests. Customs has allegedly threatened to pull the bond and/or cut services in order to put Commodities out of business.

Upon hearing argument and reviewing the brief s submitted by the parties, this Court finds that Customs has not attempted to circumvent this Court's earlier order by attempting to put Commodities out of business. The assessments appear to be reasonable and meritorious. Commodities, on the other hand, claims to have valid defenses. The real issue is whether plaintiff's records were kept in accordance with the regulations. Commodities claims that the policy and procedure manual is not a regulation. Whether the manual is a regulation and whether plaintiff's records are kept in accordance with Customs' regulations are issues which need to be litigated. However, the fact that such litigation is necessary

in no way shows that Commodities' due process rights have been violated or that Customs has attempted to destroy Commodities' business. In fact, the record shows that of the more than twenty liquidated damage claims which have been filed against Commodities, only a few remain. Those which remain total approximately $170,000 in outstanding liquidated damage assessments. The remaining claims have either been resolved or dismissed upon a showing by Commodities that Customs had no grounds for asserting such damage claims. These facts indicate that Customs and Commodities have been able to work out an agreement as to some of the liquidated damage claims. However, because certain questions need to be litigated, disputes over the remaining claims still exist.

Furthermore, this Court finds that Commodities has failed to show any damage due to the alleged bad credit rating or alleged threatening statements made to Commodities, surety, Old Republic. Commodities has characterized Customs, letter to the surety as a threat. However, this Court has reviewed that letter from Customs to Old Republic Insurance Co. and finds that it is not a threat. Instead, the letter is a formal written demand for payment of liquidated damages incurred by Old Republic as a surety on Customs' bond. The letter states in relevant part that:

> Unless payment in full is received by this office on or before September 23, 1988, appropriate Customs officials in the Detroit District will be notified to refuse acceptance of new bonds written by you as surety and to reexamine whether your current bonds provide the security intended of them. Also, we will be further reviewing the extent and number of payment deficiencies to determine if reasonable grounds exist to believe that your company is not honoring its obligations in other cases. Such circumstances could warrant that the matter be forwarded

> to Customs Headquarters and the Department of Treasury recommending the withdrawal or revocation of authority to do business as a surety with the United States Government.

The next paragraph of the letter recognizes that the surety may, in fact, have a valid reason in fact or law for not paying on the bond. If so, Customs then asks the surety to communicate those reasons in writing for immediate consideration. Apparently, Old Republic failed to give its reasons in fact or law for not paying on Customs' bond and instead, ignored the Customs' letter.

This Court finds that the letter written by Customs to Commodities' surety was not written as a threat or in threatening fashion. Instead, it was written in accordance with 19 C.F.R. §113.38(4). Section 113.38 discusses delinquent sureties and the non-acceptance of bonds written by sureties that, without just cause, are significantly delinquent on other bonds. Section 113.38(4) states as follows:

> Notice of Surety. The appropriate Customs officer may take the above actions only after the surety has been provided reasonable notice with an opportunity to pay delinquent amounts, provide justification for the failure to pay, or demonstrate the existence of a significant legal issue justifying further delay in payment.

The letter which Commodities characterizes as a threat is actually a letter written to Old Republic pursuant to §113.38, because Customs believed old Republic was a delinquent surety. The letter stated that unless payment on the bond was paid in full by a certain date, Customs, officials in Detroit would be notified to refuse acceptance of new bonds written by the surety because Customs believed the surety was not honoring its obligations in other cases. The letter also

acknowledged that Commodities' surety could dispute its obligation and fail to pay due to significant non-frivolous questions of fact or law. Accordingly, this Court finds that the language in Customs' September 6, 1988 letter to the surety was drawn from 19 C.F.R. §113.38. Although the surety was required to respond and show just cause, it failed to do so. In any event, Customs became aware that Old Republic was raising legal objections to the merits of the assessments and, therefore, pursuant to 19 C.F.R. §113.38, Customs declined to impose any sanctions against the surety.

B.

Customs asserts there has been no due process violations. In order for Customs to collect any money from Commodities, Customs claims it must first go to the Court of International Trade (hereafter CIT). Customs must bring a suit pursuant to 28 U.S.C. §1582(2) in order to collect a judgment on a liquidated damages claim. Customs asserts that in the CIT, Commodities will have an opportunity to defend itself completely at a *de novo* hearing. Before Customs can collect anything on its damages, it must bring an action and fully litigate its claims. However, Commodities asserts that this case does not belong in the CIT. Commodities asserts that this matter is within the jurisdiction of the district court pursuant to 28 U.S.C. §1352 and §1355. Therefore, this Court must address the question of where Customs can sue Commodities in the event Customs wishes to enforce its assessments.

An exception to district court jurisdiction pursuant to §§1352 and 1355 is found under 28 U.S.C. §1582. Section 1582 states that the CIT has exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States to recover upon a bond relating to the importation of merchandise required by the laws of the United States. . . 28 U.S.C. §1582(2) . Commodi-

ties asserts that in this instance, §1582(2) is inapplicable because the United States is not a plaintiff. Commodities also asserts that it is not in the importation business. According to Commodities, it is engaged in export only, pursuant to §1555(a).

This Court finds that the arguments previously asserted by Commodities with respect to the applicability of §1582(2) have already been addressed by the CIT. Commodities has already asserted that an action to enforce a liquidated damage claim does not arise out of an import transaction. Nor would such an action be brought to recover upon a bond relating to the importation of merchandise. These are two requirements of the exclusive jurisdiction of the CIT. In a suit brought by the United States against Commodities to recover unpaid liquidated damages in the amount of $6,292.96, plus interest, the CIT ruled that the action arose out of an import transaction and was brought to recover on a warehouse bond which related to the importation of merchandise. (*U.S.A. v. Commodities Export Company and Old Republic Insurance Company,* Court No. 89-03-00144, 1990). In that case, Commodities essentially argued the exact same argument it has brought before this Court. Specifically, Commodities asserted that it could not be characterized as dealing with import transactions since it operated "exclusively in export." The CIT analyzed the word "importation" as interpreted in the trade laws. The CIT reviewed several Supreme Court cases and made the following finding:

> ... the Supreme Court tacitly acknowledged that foreign-made goods in customs warehouses are imports when it wrote that "imports may be stored duty free for prescribed periods" in bonded warehouses.

Xerox Corp. v. County of Harris, Texas, 459 U.S. 145, 150 (1982). This concept was restated in *R. J. Reynolds Tobacco*

Company v. Durham County, North Carolina, 479 U.S. 130 (1986) in which the Supreme Court dealt with the issue of foreign-made goods stored in CustOMs' bonded warehouses under 19 U.S.C. §1555. "Referring to goods stored in a class 2 warehouse, as the goods in the instant case were, the court inferred that such goods are importations, but simply are not subject to duties unless withdrawn from the warehouse and injected into the stream of commerce of the United States. *Id.* at 133-34. Hence, while the Supreme Court has not explicitly held that foreign-made goods in bonded warehouses are imports, the implication that they are is quite clear." *U.S.A. v. Commodities*, (*supra*) pg. 10.

Commodities has argued that importation means the goods have entered the stream of commerce of the United States. Upon review of the word "importation" and its related terminology, the CIT did not come to the same definition as that asserted by Commodities. Instead, the CIT concluded that: "once goods are within the jurisdictional limits of the United States with the intent to discharge, they are imports under this definition. As the goods in this action had already passed into the bonded warehouse, they were well beyond that point." *Id.* at pg. 11.

The CIT was likewise not persuaded by Commodities' argument that its bond did not refer to importation. Referring to the Supreme Court's opinion in *R.J. Reynolds*, (*supra*), the CIT stated:

> The central purpose behind the Customs' bonded warehouse [is] to insure that federal customs' duties are collected.

479 U.S. at 131. "While the bond is not entitled @importation bond, and does not refer to the importation of merchandise, it clearly was designed to deal with instances where duty-free goods have, in fact, entered into the stream of

commerce of the United States without payment of the appropriate duties and taxes. As such, the bond related to the importation of merchandise." *U.S.A. v. Commodities*, (*supra*) at pg. 13. As a result, the CIT has clearly concluded that suits to recover unpaid liquidated damage assessments could, in fact, be brought in the CIT by Customs against Commodities pursuant to 28 U.S.C. §1582(2). In the event Customs desires to collect liquidated damages from Commodities, Customs must file a lawsuit pursuant to §1582(2).

This Court also finds that Commodities has no independent right to a "full-blown" hearing conducted by an ALJ pursuant to the Administrative Procedure Act.. Neither party has pointed to a specific statute, and this Court cannot find a specific statute, which allows Commodities the right to an APA hearing. Instead, this Court finds that pursuant to the Customs laws and regulations, Commodities could have obtained relief through use of the petition process set forth in 19 C.F.R. §172. However, Commodities asserts that it was misled by Customs into believing that only the protest procedure was available. As a result, Commodities may not have utilized the petition process to its full potential. At the hearing, Commodities also argued that the petition process was somewhat of a "kangaroo court" in that Commodities would not have appealed to a neutral party, but rather would have been asking Customs to change its mind. This Court finds that even assuming this to be true, no due process violations could occur. Even if the petition process ended in favor of Customs and Commodities was denied its requested relief, Commodities still could not lose its property without a hearing. Even if Commodities lost at the petition process level, Customs could not have obtained a judgment and could not enforce or attempt to collect its liquidated damage assessments without becoming a plaintiff pursuant to 28 U.S.C. §1582(2). To recover any damages, Customs must bring a lawsuit against Commodities. During that suit, Customs' assessments would be presented to an impartial trier

of fact. The reasons for Commodities' failure to pay those claims would also be presented. As a result, before Commodities would actually be liable on the assessed damages claims, Commodities would receive a full hearing, during which it would have an opportunity to present its defenses, cross-examine Customs' witnesses and argue its case. Due process requires nothing more.

C.

According to Commodities, certain Customs agents and/or officers have made statements indicating they will do everything in their power, and even beyond their power, to insure that Commodities no longer does business as a duty-free store.

Customs asserts that any alleged employee threats made to Commodities with respect to cutting services to Commodities or closing Commodities down is insufficient to survive a motion to dismiss. Even assuming those threats were made, Customs submits the employees who made them could not follow through on their threats. According to Customs, there has also been no evidence shown which indicates that the employees attempted to follow up on their threats. Nor has any evidence been shown indicating these employees succeeded with their threats. Without more, Customs asserts that these alleged threats in no way indicate or prove that Commodities, due process rights have been violated.

Customs, employees Silverman and Maton allegedly threatened to close down Commodities' business or in some way take away services. Even assuming the threats to be true, this Court finds that the threats have not violated Commodities, due process rights. The threats have not been followed-up or carried out in any way. Furthermore, the Customs law would give no authority to carry out such threats. (Affidavit of William L. Morandini, District Director,

Detroit District of U.S. Customs). In any event, Commodities has shown no damage from the alleged threats. Despite claiming he would close Commodities down prior to retiring, Silverman did not do so. Silverman has since retired and Commodities is still in business. If anything, this Court finds that these threats appear to be the result of antagonism between the parties due to the intensity of this dispute. Not only have these parties hotly contested these damage claims, but the parties' attorneys have also inflamed their arguments to this Court and the Court of Appeals. In fact, the Sixth Circuit even had to address this intensity by asking the parties to more thoroughly and carefully analyze the issues and be less inflammatory. (*Commodities v. U.S. Customs,* 888 F.2d 431, 435 (6th Cir. 1989)).

D.

Finally, Customs asserts that Commodities' FOIA requests are insufficient to give this Court jurisdiction. This Court agrees. The Sixth Circuit has indicated in its opinion that no jurisdiction can exist merely because of the FOIA request, unless the refusal to comply with those requests somehow supports a claim that Customs sought to ruin Commodities, business. No such showing has been made in this instance. This Court concludes that Commodities' FOIA request does not alone create jurisdiction in the district court. The facts show that Commodities' FOIA request was declined as being too amorphus. The FOIA requests of Commodities were not denied by Customs, local office, but rather, at a higher level. Furthermore, plaintiff has been provided numerous documents and does not appear to have been hampered by the FOIA denial. Finally, Commodities has failed to bring a separate action for FOIA disclosure. As a result, this Court finds that the failure to comply with Commodities' FOIA requests does not involve a due process violation.

II.

With respect to Commodities, argument that it was misled by Customs into believing that it could only utilize the protest procedure to object to the assessed damages, this Court finds that such an argument does not create a due process violation. Customs asserts that it has in no way misled Commodities into believing that the protest procedure was the only one available. Even assuming that Customs did mislead Commodities, this Court still finds no due process violation. As already stated, Commodities was still guaranteed a due process hearing prior to the enforcement of any Customs assessment.

III.

During the hearing, Commodities made several requests which this Court has now addressed. Based upon the foregoing, this Court refuses to enjoin further enforcement of past assessments or assessments of future damage claims. The disputes which exist based on those Customs, assessments will need to be fully litigated at the appropriate time. Without making a finding as to whether Customs' assessments are valid, this Court finds that they have been reasonably brought pursuant to Customs' interpretation of the appropriate regulations. As a result, this Court finds that assessments have not been brought for purposes of putting Commodities out of business or for purposes of disobeying this Court's previous order. This Court also refuses to determine who should adjudicate disputes with respect to the TV/VCR monitoring system currently in place on Commodities' business location. Such disputes should also be litigated along with the assessment disputes.

This Court will not force compliance with Commodities' FOIA requests. Commodities' FOIA request was not denied at Customs, local office. Commodities has not filed a

separate suit. Commodities has also not shown any damages as a result of this denial.

Based on the foregoing and based on the previously cited opinion of the CIT, this Court also refuses to declare that duty-free stores are not subject to CIT jurisdiction. In fact" Commodities, argument with respect to the applicability of §1582(2) has already been addressed. The CIT has already determined that when Customs brings a suit against Commodities to enforce its liquidated damage assessments, such suit arises out of an import transaction and is brought to recover upon a bond relating to the importation of merchandise. Therefore, the requirements for exclusive jurisdiction in the CIT are satisfied.

CONCLUSION

Based upon the foregoing, this Court hereby finds that no due process claims exist which would in and of themselves give this Court jurisdiction over this matter. Accordingly, this Court hereby GRANTS the government's motion to DISMISS. However, in doing so, this Court specifically retains jurisdiction over its previous court order. If necessary, this Court will insure that Commodities is allowed to continue operating pursuant to that original order.

IT IS SO ORDERED.

Lawrence P. Zatkoff
United States District Judge

Supreme Court, U.S.
FILED
AUG 24 1992
OFFICE OF THE CLERK

No. 91-2063

In the Supreme Court of the United States

OCTOBER TERM, 1992

COMMODITIES EXPORT CO., PETITIONER

v.

UNITED STATES CUSTOMS SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that, in the circumstances of this case, petitioner's claims involving the government's assessments against it for breach of its warehouse bond should be transferred from the district court to the Court of International Trade.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	10
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Allen v. *McCurry*, 449 U.S. 90 (1980)	7
Christianson v. *Colt Indus. Operating Corp.*, 486 U.S. 800 (1988)	8
Hoffman v. *Blaski*, 363 U.S. 335 (1960)	8
K Mart Corp. v. *Cartier, Inc.*, 485 U.S. 176 (1988)	6
Trayco, Inc. v. *United States*, No. 91-2555:	
(4th Cir. Mar. 2, 1992)	6
(4th Cir. June 19, 1992)	7

Statutes, regulation and rule:

Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1908, 102 Stat. 1315-1316	3
19 U.S.C. 1555	3
19 U.S.C. 1555(b)(3)(F)(ii)	3
19 U.S.C. 1623	3
19 U.S.C. 1623(b)	3
28 U.S.C. 1295(a)(2)	7
28 U.S.C. 1346(a)(2)	6, 7
28 U.S.C. 1581	6, 8
28 U.S.C. 1581(i)	6, 8
28 U.S.C. 1581(i)(3)	6
28 U.S.C. 1582	9
28 U.S.C. 1582(2)	4, 8

Regulations and rule—Continued: Page

28 U.S.C. 1631 ..... 5, 8
19 C.F.R. 172.1 3
Fed. R. Civ. P. 60(b) (5) 5, 9

Miscellaneous:

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (1981 & Supp. 1992) 7

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 957 F.2d 223. The opinion of the district court (Pet. Supp. 1-16[1]) is unreported. An earlier opinion by the court of appeals in this case (Pet. App. A20-A38) is reported at 888 F.2d 431. An opinion of the Court of Interna-

[1] The district court decision is not included in the appendix to the petition, but was subsequently filed as a separate document. We refer to that document as "Pet. Supp."

tional Trade in a related case between the parties (Pet. App. A39-A52) is reported at 733 F. Supp. 109. The opinion of the Court of Appeals for the Federal Circuit in that case (App., *infra*, 1a-13a) was issued on August 11, 1992, and is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1992. A petition for rehearing was denied (Pet. App. A53) on March 30, 1992. The petition for a writ of certiorari was filed on June 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Duty-free" stores avoid paying duties and taxes normally due at importation or before sale by storing otherwise dutiable or taxable goods in bonded warehouses. Petitioner's duty-free store is located in Detroit, Michigan, near the entrance to the Ambassador Bridge that connects Detroit with Windsor, Canada. Petitioner's store is the only duty-free store in the United States that is located before the "point of no return"—the point at which a customer carrying goods purchased at the store must check them through customs before bringing them back into the United States. Pet. Supp. 2. Petitioner's customers are supposed to carry their purchases across the bridge into Canada, in which case they are required to go through a customs checkpoint before re-entering the United States; as a practical matter, however, they have the opportunity simply to stay in Detroit. Petitioner's unique location greatly increases the risk of "runaway" goods—that is, goods sold at a duty-free shop on the supposition that they will immedi-

ately be taken out of the United States, but that in fact remain in the United States without payment of the required taxes and duties. *Ibid.*[2]

2. a. Petitioner (like other duty-free sales enterprises) operates under a warehouse bond intended to secure compliance with regulations of the United States Customs Service (Customs) pertaining to storage and marking of merchandise, as well as certain recordkeeping procedures. See 19 U.S.C. 1555, 1623; Pet. App. A23. Customs is authorized to assess liquidated damages, payment of which is secured by the bond, in response to infractions by the store operator. See, *e.g.*, Pet. App. A23; 19 U.S.C. 1623(b); 19 C.F.R. 172.1. Between 1983 and 1987, Customs notified petitioner of more than 20 such assessments for liquidated damages based on breaches of the terms of its bond.[3] After petitioner refused to pay most of these, Customs instituted administrative actions to collect.

In March 1988, petitioner returned to the district court that had granted the 1976 injunction (see note 2,

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[2] In 1976, shortly after petitioner opened for business, the Customs Service determined that all duty-free stores must operate beyond the point of no return. Petitioner obtained a federal district court injunction, however, permitting it to continue at its present location, with surveillance (originally by a person stationed on top of the store, later by videotaping the store's operations) to guard against "runaways." Pet. Supp. 2. Customs' policy was codified at 19 U.S.C. 1555(b)(3)(F)(ii) by Section 1908 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1315-1316, but with an exception for pre-existing stores.

[3] Petitioner implies that $1,000,000 is at stake in this case. Pet. 6. Customs, however, believes that the total amount currently in dispute, including assessments not yet ripe for litigation, is roughly $150,000. See Pet. App. A23-A24.

supra), arguing that Customs was attempting to put it out of business with meritless liquidated damages claims. In August 1988 the district court dismissed petitioner's claim, holding that the United States Court of International Trade (CIT) had exclusive jurisdiction over the subject matter. See Pet. App. A26-A27. On appeal, the Sixth Circuit vacated and remanded for further analysis of the jurisdictional issues, and also ordered the district court to rule on the merits of petitioner's claim that Customs had violated its due process rights. *Id.* A20-A38.

b. While the first appeal to the Sixth Circuit was pending, Customs brought suit in the CIT under 28 U.S.C. 1582(2) to recover on one of the liquidated damage claims. Pet. App. A4-A5. Under Section 1582(2) (Pet. App. A67), the CIT has exclusive jurisdiction over "any civil action which arises out of an import transaction and which is commenced by the United States * * * to recover upon a bond relating to the importation of merchandise." In March 1990, the CIT ruled that the case concerned an "import transaction" and a "bond related to the importation of merchandise" within the meaning of Section 1582(2), and that therefore the CIT had exclusive jurisdiction. Pet. App. A39-A52. On August 11, 1992, the United States Court of Appeals for the Federal Circuit affirmed the CIT's jurisdictional ruling, although it reversed on statute of limitations grounds the CIT's decision granting Customs recovery on the bond. App., *infra*, 13a.

c. In November 1990 the district court, on remand from the Sixth Circuit, granted Customs' motion to dismiss petitioner's case in that court. Adopting the reasoning of the CIT in the government's collection

action, the district court held that the CIT had exclusive jurisdiction over the liquidated damages questions raised in this case. Pet. Supp. 10-12, 16. The district court held further that petitioner had made out no due process claim because it would in any event be entitled to a full and fair hearing before the CIT before Customs could enforce its claim for liquidated damages. *Id.* at 12-15.

d. Petitioner's second appeal to the Sixth Circuit resulted in the decision below. Pet. App. A1-A19. The court of appeals held (*id.* at A13-A14) that by virtue of the CIT's decision, rendered prior to the decision on remand in the district court, the question of the CIT's jurisdiction was "*res judicata.*" Because it determined, after full analysis, that the CIT had the power to decide its own jurisdiction and had properly exercised that power, *id.* at A7-A14, the court of appeals affirmed the district court's ruling that the CIT had exclusive jurisdiction over this action. *Id.* at A13-A14. After further determining (*id.* at A15-A17) that the CIT was fully competent to resolve petitioner's due process claims, the court of appeals vacated the district court's ruling on those claims (*id.* at A14-A15) and instructed the district court to transfer the entire case to the CIT pursuant to 28 U.S.C. 1631. Pet. App. A18.[4]

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[4] The court of appeals noted that if the CIT's jurisdictional determination were reversed on appeal to the Federal Circuit, or if the CIT and the Federal Circuit refused to address petitioner's due process claims after transfer of this case, then petitioner could file a motion for relief from the judgment below under Fed. R. Civ. P. 60(b)(5). Pet. App. A17-A18.

ARGUMENT

The decision below does not conflict with that of any other court of appeals, and is consistent with the decisions of the CIT and the Federal Circuit in a case involving essentially identical facts brought by the government against petitioner. The decision assures petitioner a forum in which to resist enforcement of liquidated damages (as it has done successfully in the Federal Circuit) and to air any related grievances, and provides the CIT with the opportunity to decide in the first instance whether it has jurisdiction to hear a case involving basically the same facts brought by petitioner against the government. Nothing in the case, in its present posture, warrants further review by this Court.

1. Petitioner argues that the decision here conflicts with that of the United States Court of Appeals for the Fourth Circuit in *Trayco, Inc.* v. *United States*, No. 91-2555 (Mar. 2, 1992). We do not agree that the two decisions were at odds.[5] In any event, how-

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[5] In *Trayco*, the Fourth Circuit held that the district court had jurisdiction under 28 U.S.C. 1346(a)(2) over an action by an importer to recover a penalty imposed by the Customs Service for alleged mislabeling of goods. The court held that nothing in 28 U.S.C. 1581 specifically gave the CIT jurisdiction over such a suit. See also *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988) (Section 1581(i)(3), concerning "embargoes," does not grant CIT jurisdiction over suit contesting Customs' decision to allow entry of certain "gray market" goods). The facts in this case are quite different, and may fall within Section 1581(i)'s specific grant of jurisdiction over suits arising from the substance, administration or enforcement of federal laws concerning revenue from imports. See Pet. App. A18-A19, A37-A38 (opinions of Nelson, J.). That possibility was not present in *Trayco* (or in *K Mart*).

ever, the Fourth Circuit has now vacated its decision and transferred the *Trayco* appeal in its entirety to the Federal Circuit. *Trayco, Inc.* v. *United States*, No. 91-2555 (June 19, 1992).[6]

2. The court of appeals carefully considered (Pet. App. A9-A12) whether the CIT had the judicial authority to determine the scope of its own jurisdiction, and concluded that it did. It then concluded (*id.* at A12-A13) that the CIT's decision on jurisdiction in the enforcement action brought by the United States was reasonable, and that no substantial public interest would be undermined by deferring to that decision. In view of these conclusions, and the fact that the CIT had already upheld its own jurisdiction in a case between the same parties involving essentially identical facts,[7] the court deferred to the

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[6] In its order granting the government's request for rehearing in *Trayco*, the Fourth Circuit recognized that 28 U.S.C. 1295(a)(2) gives the Federal Circuit exclusive jurisdiction over appeals where district court jurisdiction was based in whole or in part on 28 U.S.C. 1346(a)(2). Since the court had determined that the district court's jurisdiction was based on Section 1346(a)(2), transfer to the Federal Circuit was mandatory. Slip op. 2.

[7] The court correctly recognized that the decisions of the CIT and the Federal Circuit on issues already fully and fairly litigated between Customs and petitioner and necessarily decided by those courts in the course of Customs' enforcement action should be afforded preclusive effect in subsequent litigation between the parties. See Pet. App. A7-A8, A13-A14. See generally, *e.g.*, *Allen* v. *McCurry*, 449 U.S. 90, 90-91 (1980); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4416 (1981 & Supp. 1992). In upholding the CIT's jurisdiction over the enforcement action, the Federal Circuit necessarily (and explicitly, App., *infra*, 7a) decided that in "bringing [foreign] merchandise

CIT's decision and, "in the interest of judicial economy," Pet. App. 18a, ordered this case transferred to the CIT under 28 U.S.C. 1631.

It will of course remain for the CIT, after the transfer, to consider in the first instance whether a case of this nature—one filed by an importer challenging Customs' administrative actions with respect to a warehouse bond, in the absence of an enforcement action on the bond brought by Customs in the CIT—can be maintained at all.[8] That is a question that has not yet, to our knowledge, been decided by any appellate court, in this or any other case.[9] Should the CIT (and the Federal Circuit) decide that peti-

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into the United States, [petitioner] conducted an 'import transaction'" and that petitioner's warehouse bond is "a bond relating to the importation of merchandise" within the meaning of 28 U.S.C. 1582(2). These rulings, which need not be relitigated between the parties, will be highly relevant to any determination of whether the CIT has jurisdiction over this related action under 28 U.S.C. 1581, and particularly under Section 1581(i). See Pet. App. A18-A19, A37-A38 (opinions of Nelson, J.).

[8] If the action is cognizable at all, it may be that the propriety of the CIT as the forum for this particular case has been settled, as law of the case, by the Sixth Circuit's decision. See *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 819 (1988). We note, however, that *Christianson* involved a transfer between two appellate courts, rather than a transfer for purposes of trial, and that the specific limiting language of 28 U.S.C. 1631 (permitting transfer to a court "in which the action * * * could have been brought") would have to be considered. See *Hoffman* v. *Blaski*, 363 U.S. 335, 340-344 & n.9 (1960).

[9] Judge Nelson, in his separate opinion in the first appeal, did suggest that under 28 U.S.C. 1581(i) the CIT would have exclusive jurisdiction of such a suit. Pet. App. A37.

tioner cannot bring such an action directly, however, petitioner will not be without remedy or adequate process. The most obvious method for petitioner to challenge any Customs assessment (or alleged collateral misconduct) in court would be, as the district court held (see, *e.g.*, Pet. Supp. 12-13), to wait for the action that Customs would be required to bring in the CIT in order to enforce its assessment. In that case the CIT would have incontrovertible jurisdiction based on 28 U.S.C. 1582, and the court of appeals has held (Pet. App. A15-A17) that the CIT would have full power to consider and decide petitioner's constitutional or other claims.[10] Moreover, should the CIT or the Federal Circuit deny jurisdiction or leave petitioner's constitutional claims "wholly unaddressed," the Sixth Circuit has explicitly indicated (Pet. App. A17-A18) that it would entertain a motion by petitioner under Fed. R. Civ. Proc. 60 (b)(5) to revisit its judgment in this case.

The decision below thus leaves petitioner with the ability to pursue this litigation in the first instance in the CIT and the Federal Circuit, and makes clear that petitioner will not be left without any forum in which to raise its claims. Under the circumstances, we believe that review by this Court at this juncture is unwarranted and would be premature.

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[10] Indeed, petitioner succeeded in the Federal Circuit in having the CIT's judgment enforcing some Customs assessments reversed on statute of limitations grounds. App., *infra*, 8a-13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1992

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-1470, -1482

THE UNITED STATES, PLAINTIFF-APPELLEE

v.

COMMODITIES EXPORT CO., DEFENDANT-APPELLANT

and

OLD REPUBLIC INSURANCE CO.,
DEFENDANT-APPELLANT

DECIDED: August 11, 1992

Before ARCHER, *Circuit Judge*, BENNETT, *Senior Circuit Judge*, and RADER, *Circuit Judge*.

RADER, *Circuit Judge*.

The United States sued Commodities Export Company and Old Republic Insurance Company in the United States Court of International Trade to recover unpaid liquidated damages under a customs warehouse bond. The trial court entered judgment

in favor of the United States. *United States v. Commodities Export Co. & Old Republic Ins. Co.*, CIT No. 89-03-00144, May 14, 1991. Because the United States did not file its action within the six year statute of limitation, 28 U.S.C. § 2415(a) (1988), this court reverses.

BACKGROUND

Section 1557(a) of Title 19 (1988) allows an importer to store imported foreign merchandise in a bonded warehouse for up to five years from the date of importation without paying duties. An importer must pay duties on merchandise removed from storage for consumption within this country. *Id.* An importer pays no duties, however, on merchandise withdrawn from storage for export. *Id.*

Commodities sells both domestic and foreign goods from its duty-free store. This store lies directly adjacent to the Canadian border in Detroit., Commodities stores its merchandise in a bonded warehouse under 19 U.S.C. § 1557(a). As a duty-free sales enterprise, Commodities sells its merchandise in export only. *See* 19 U.S.C. § 1555(b) (1988). Thus, Commodities sells its merchandise to persons immediately leaving the United States to enter Canada. In the event of a sale to persons remaining in the United States, Commodities must collect duties. *See United States v. Commodities Export Co.*, 733 F. Supp. 109, 110 (Ct. Int'l Trade 1990) (*Commodities I*).

"To insure payment of duties and other charges due to runaways and other infractions," the United States entered into a warehouse bond agreement with Commodities, as principal, and Old Republic Insur-

ance, as surety. *Id.* Under the agreement, Commodities and Old Republic jointly and severally promised to pay liquidated damages of $100 for each violation of the bond's terms. Moreover, they agreed to pay liquidated damages of five times the duty and tax on any dutiable merchandise removed from the warehouse without the Customs Service's approval. The bond required Commodities to mark its merchandise correctly and to notify Customs of any inventory discrepancies.

On February 22, 1983, Customs conducted a spot check of Commodities' warehouse. The investigation revealed that Commodities had not properly marked 37 warehouse entries and had not notified Customs of inventory shortages in seven entries. On March 21, 1983, Customs sent Commodities a demand for payment of liquidated damages for breach of the bond. *See* 19 C.F.R. 172.1(a) (1982). The demand required Commodities to pay $6,293.96 or petition for relief within 60 days. On May 19, 1983, Commodities objected to the assessment of liquidated damages. Customs denied Commodities' petition on November 4, 1987. On November 20, 1987, Customs formally demanded payment by Old Republic within 30 days. On February 20, 1988, March 5, 1988, and March 19, 1988, Customs issued bills to Commodities and Old Republic for payment of the liquidated damages. Neither defendant paid Customs.

On March 17, 1989, the United States brought this action against Commodities and Old Republic to recover the unpaid liquidated damages. The trial court denied defendants' motion to dismiss for lack of subject matter jurisdiction. *Commodities I.* Defendants then moved to dismiss because the statute of limitations had run and because Customs had actually

liquidated the goods duty-free. The trial court denied this motion also. *United States v. Commodities Export Co.*, 755 F. Supp. 418 (Ct. Int'l Trade 1991) (*Commodities II*).

At trial, the jury affirmed the validity of the bond agreement and found that Commodities had breached the bond. On May 14, 1991, the court entered judgment in favor of the United States.

DISCUSSION

I.

Section 1582 of Title 28 (1988) sets forth exclusive jurisdiction for the Court of International Trade:

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—
>
> > (1) to recover a civil penalty under section 592, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;
> >
> > (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or
> >
> > (3) to recover customs duties.

Thus, to fall within the exclusive jurisdiction of the Court of International Trade, this action to recover on a bond must be "commenced by the United States," "arise[] out of an import transaction," and "relat[e] to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury." *Id.*

The United States' commencement of this action satisfies the first element. The second and third elements require this court to construe the terms "import transaction" and "importation." Specifically this court must determine whether foreign goods in a bonded warehouse are "imported" within the meaning of 28 U.S.C. § 1582(2). The statutes governing bonded warehouses repeatedly refer to warehouse goods as imports. For instance, 19 U.S.C. § 1557(a) permits an importer to store merchandise in a bonded warehouse without payment of duties for up to five years from the date of "importation." Section 1557 thus considers goods imported upon their entry into this country, rather than upon payment of duties before merchandise enters domestic commerce.

Similarly, section 1555(a) of Title 19—the statute authorizing Commodities' and Old Republic's bond—refers to "imported" merchandise in customs bonded warehouses. Thus, goods in bonded warehouses are "imported" upon entry into this country and storage in a bonded warehouse. The importer need pay no duties to "import" merchandise stored in its warehouse. The Supreme Court has adopted the language of Title 19 in referring to goods in bonded warehouses. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 134 n.3 (1986) ("Goods may remain in a customs-bonded warehouse for up to five years from the date of importation . . . ."); *see also Xerox Corp. v. County of Harris*, 459 U.S. 145, 150 (1982) ("Congress established a comprehensive customs system which includes provisions for Government-supervised bonded warehouses where imports may be stored duty free for prescribed periods."); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923) ("If

there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.").

In *Stone & Downer Co. v. United States*, 19 CCPA 259, 264 (1931), *cert. denied*, 287 U.S. 619 (1932), this court's predecessor noted that "importation" has a different meaning for the timing of duty payments. *Stone & Downer* clarified that Title 19 requires Customs to assess duties at the time foreign goods in a bonded warehouse enter into domestic commerce, rather than at the time these goods enter the warehouse. *Id.* In that context, Customs collects duties on "imported" goods upon entry into domestic commerce. Because this appeal does not concern the timing of duty assessments, *Stone & Downer* is not applicable.

By referring to "import transaction" or "importation of merchandise," 28 U.S.C. § 1582 gave the Court of International Trade jurisdiction over bonded warehouses. The phraseology of section 1582 underscores the breadth of this jurisdictional grant. A civil action need only arise out of an import transaction to fall within the court's jurisdiction. Moreover a bond need only relate to importation. This broad language commits a wide spectrum of controversies concerning the importation process to the Court of International Trade.

The legislative history of section 1582 also supports the breadth of the jurisdictional grant to the Court of International Trade. The House report accompanying the 1980 rewrite of this provision described the court's jurisdiction as "a comprehensive system of judicial review of civil actions arising from import transactions." H.R. Rep. No. 1235, 96th

Cong., 2d Sess. 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731.

Under the terms of 28 U.S.C. § 1582(2), this action against Commodities falls within the jurisdiction of the Court of International Trade. The United States brought the action. Two-thirds of the merchandise in Commodities' warehouse is foreign. By bringing this merchandise into the United States, Commodities conducted an "import transaction." This civil action thus "arises out of an import transaction," satisfying the second jurisdictional requirement of 28 U.S.C. § 1582(2).

Finally, the bond in this case relates to importation in at least two ways. The bond's terms deal with Commodities' documentation and manipulation of imported merchandise in its warehouse. The bond also ensures payment of duties on imported merchandise in the event those duties become payable. Therefore, Commodities' bond "relat[es] to the importation of merchandise," satisfying the third element of 28 U.S.C. § 1582(2). The trial court therefore properly exercised jurisdiction over this action.

II.

This court must next determine the statute of limitations which applies to this action. Section 1621 of Title 19 sets forth a five-year limitation on any "suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws." 19 U.S.C. § 1621 (1988). Section 2415(a) of Title 28 provides a six-year limitation on "every action . . . brought by the United States or an officer or agency thereof which is founded upon any contract," 28 U.S.C. § 2415(a).

The five-year statute of limitations in 19 U.S.C. § 1621 does not apply in this case because the United States does not seek "pecuniary penalt[ies] . . . accruing under the customs laws." *See also United States v. Imperial Food Imports*, 834 F.2d 1013, 1016, 6 Fed. Cir. (T) 37, 40 (1987) ("Liquidated damages are not penalties if they are reasonable and the exact amount of the damages sustained would be difficult to prove."). Rather, the United States brought this action to recover liquidated damages under the terms of a contract, the bond agreement. Because "founded upon [a] contract," this action falls within the language of 28 U.S.C. § 2415. Therefore, the trial court properly applied a limitations period of six years in this case.

III.

Finally this court must decide whether the United States filed this action within the applicable statutory period. Under 28 U.S.C. § 2415(a), the United States may not bring an action "unless the complaint is filed within six years after the right of action accrues."

The trial court determined that the Government's right of action accrued on May 20, 1983, after Customs followed its own regulations. *Commodities II*, 755 F. Supp. at 422. In these regulations Customs imposes on itself the requirement to demand payment from a party who has not met the conditions of a customs bond. 19 C.F.R. § 172.1(a).[1] If that party

[1] It appears that Customs may not have adhered strictly to its regulations. Section 172.1(a) of Title 19 of the Code of Federal Regulations (1982) requires Customs to notify the surety of liability on the bond "at the same time as the

does not pay within 60 days of Customs' mailing of notice, "the district director of Customs, after required collection action, shall refer the claim promptly to the United States attorney." 19 C.F.R. § 172.2(a) (1982).

As a general principle, this court recognizes that "[u]nder federal law governing statutes of limitations, a cause of action accrues when all events necessary to state a claim have occurred." *Chevron U.S.A. v. United States*, 923 F.2d 830, 834 (Fed. Cir.), *cert. denied*, 112 S. Ct. 167 (1991); *Nager Elec. Co. v. United States*, 368 F.2d 847, 851-52 (Ct. Cl. 1966). The Supreme Court also has long recognized this general rule. *United States v. Lindsay*, 346 U.S. 568, 569 (1954) ("In common parlance a right accrues when it comes into existence . . . ."); *Unexcelled Chem. v. United States*, 345 U.S. 59, 65 (1953) ("A cause of action is created when there is a breach of duty owed the plaintiff. It is that breach of duty, not its discovery, that normally is controlling").

This court must assess, however, the effect of Customs' regulations on this general rule for accrual of a right of action. In *Crown Coat Front Co. v. United States*, 386 U.S. 503, 509-11 (1967), the Supreme Court permitted a Government contract's disputes clause to delay accrual of a right of action arising under the contract. The contract bound the contractor

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principal." According to the original complaint in this action, the United States made a formal demand on Old Republic on November 20, 1987—over four years after it made a demand on Commodities. The only other evidence of record before this court on this issue, Customs' own automated billing record, gives November 16, 1987, as a date Customs made a demand on the surety.

to exhaust administrative remedies before instituting suit. *Id.* at 511-12. Where the parties had agreed in advance to a condition on the filing of a suit, the Supreme Court gave effect to that agreement by delaying accrual of the right of action.

In this case, however, the parties have not agreed to conditions on institution of a suit, rather Customs has unilaterally adopted regulations which delay filing of actions. The bond agreement does not require Customs to demand payment or to send notice before suing Commodities or Old Republic. The bond does not require Customs to wait 60 days for a response to the demand before suing. Moreover, Customs' regulations do not state that commencement of the statutory period is postponed until after Customs gives notice and waits 60 days for a response. No statute requires Customs to give notice of demand for liquidated damages before suing. Without agreement of the parties or statutory obligations delaying the institution of suit, the general rule for accrual of a right of action still applies.[2]

The trial court erred in postponing commencement of the limitations period until after Customs complied with its own regulations. While Customs' self-imposed internal procedures, may constrain its right to sue, a question we do not decide here, they cannot change the defendants' right to repose after

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[2] Under the bond agreement, Old Republic agreed to pay liquidated damages "[i]f principal defaults." The bond agreement did not require Customs to demand payment from Old Republic before suing. Thus, under the terms of the bond, Old Republic incurred liability to Customs when Commodities breached the bond. Customs' right of action against Old Republic therefore accrued at the same time its right of action accrued against Commodities.

the statutory six-year period. Customs' internal procedures are a unilateral effort to settle the dispute without resort to legal action.[3] This court cannot, however, permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations.

By its terms, 28 U.S.C § 2415 is subject also to statutory exceptions to the general rule regarding accrual of causes of action. The relevant statute, 28 U.S.C. § 2416 (1988), states:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—
>
> . . . .
>
> (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances . . . .

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[3] The Supreme Court has referred in dicta to 28 U.S.C. § 2415 as "a statute aimed at equalizing the litigative opportunities between the Government and private parties." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 (1967). The Supreme Court noted that "[t]he congressional intent to 'put the Government on a parity with those private litigants who may sue' and 'to equalize the position of litigants' is sufficiently evident." *Id.* at 521 n.14 (citations omitted).

The intent of "equality" is not served by allowing the Government to unilaterally postpone accrual of a cause of action. A private corporation suing the Government may not stall the commencement of the statute of limitations merely with in-house proceedings which precede any lawsuit. Similarly, the Government may not indefinitely postpone the running of the statute merely by taking the steps any prudent litigant would take before bringing a lawsuit.

[4] While acknowledging that this subsection would primarily apply to cases of fraudulent concealment of Government

The language of section 2416(c) requires this court to examine the nature of the "facts material to the right of action." Only facts which could not reasonably be known by a relevant Government official postpone accrual. Under the facts of this case, relevant Government officials reasonably could have known of the cause of action before March 17, 1983. Thus, in the words of our sister circuits, "once the facts making up the 'very essence of the right of action' are reasonably knowable, the § 2416 bar is dropped." *United States v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1250 (9th Cir. 1988) (quoting *United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984) (quoting S. Rep. No. 1328, 89th Cong., 2d Sess. 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2508)).

Section 2416(c) does not postpone accrual of the Government's cause of action beyond March 17, 1983. On February 22, 1983, Customs inspected Commodities' warehouse. These inspecting officials found that Commodities had not marked some merchandise with

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causes of action, Congress recognized that the complexities and size of the Government could impede responsible officials' knowledge of material facts. S. Rep. No. 1328, 89th Cong., 2d Sess. 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2507; *see also United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984). The legislative history of section 2416(c) explains:

> It is not intended that the application of this exclusion will require the knowledge at the highest level of the Government. Responsibility in such matters may extend down into lower managerial levels within an agency. As a general proposition, the responsible official would be the official who is also responsible for the activity out of which the action arose.

S. Rep. No. 1328 at 6.

proper warehouse entry numbers. The absence of the markings breached the bond. Simply viewing the boxes made this blatant breach apparent. Thus, because the Government's right of action accrued before March 17, 1983, this action is time barred.

CONCLUSION

The Court of International Trade properly asserted jurisdiction over this action. That court also applied the proper statute of limitations. However, that court erred in finding that the Government had filed its action within the six-year time bar.

REVERSED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMODITIES EXPORT CO.,

Petitioner,

V

U.S. CUSTOMS SERVICE,

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Reply to Government's Opposition Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. The Government (as the Sixth Circuit [A1-19]) fails to recognize that the subject matter jurisdiction of the Court of International Trade ("CIT") is *party specific* and erroneously implies that a finding of CIT jurisdiction under 28 USC 1582(2), where *only* the Government can be the plaintiff, means that there is CIT jurisdiction in this case where Commodities is the plaintiff. 1

II. There are two views of this case: (1) it is Customs' attempt to put Commodities out of business by using the bond liquidated damages assessments as a pretext; (2) it is Commodities' attempt to obtain judicial review of bond liquidated damages assessments. In either, *since Commodities is the plaintiff*, the federal district courts have jurisdiction. 5

III. On August 11, 1992 the Federal Circuit upheld the CIT's jurisdictional ruling in *Commodities, supra*. (GA1a-13a.) Commodities respectfully disagrees because that decision fails either to analyze or recognize how duty-free stores actually operate which is exclusively in *export*. 7

IV. The Supreme Court has not defined "importation," "imported," or "import transaction." It may now be necessary to do so. The Cold War is over. The United States is now in an economic war: it is about to implement a number of trade agreements. In one form or another these terms will continue to return to this Court. 10

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Commodities Export Co v US Customs Service, 888 F2d 431 (6th Cir 1989) 6, 7

Commodities Export Co v US Customs Service, 957 F2d 223 (6th Cir 1992) 1-3, 7

Stone & Downer et al v US, 19 CCPA 259, 264 (1931), *cert. den.*, 287 US 619 (1932) 8, 9

US v Commodities Export Co, 733 F Supp 109 (CIT 1990) 2

US v Commodities Export Co, _____ F2d _____ (Fed Cir 1992), Fed Cir Slip Op 91-1470 & -1482 (August 11, 1992) 4, 5, 7-9

Statutes

19 USC 1555(a) 9
19 USC 1555(b) 9
19 USC 1555(b)(3)(F)(ii) 5
19 USC 1557(a) 9
19 USC 1623(b)(1) 4
26 USC 5214(a)(9) 9
28 USC 1352 . . . . . 2, 4, 6
28 USC 1355 . . . . . 2, 4, 6
28 USC 1581 . . . . . 2-4, 6
28 USC 1581(a) 3
28 USC 1581(i) 3, 4, 6
28 USC 1582 . . . . . 2, 3
28 USC 1582(2) 1-3, 6-9
28 USC 1631 3

Customs Regulations

19 CFR 113.2(a) 4

NOTE

References to the documents filed in the Supreme Court are in date order as follows: Commodities' Petition for Writ of Certiorari ("C") and the Appendix incorporated therein ("A"); the Opinion of the Trial Court, i.e., the federal district court in Detroit ("D"); the Government's Brief in Opposition ("GB") and the Appendix incorporated therein ("GA"), followed by the page number(s). Thus, "A1-19" refers to pages 1 through 19 of the Appendix incorporated in Commodities' Petition for Writ of Certiorari.

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Reply to Government's Opposition Brief

I. The Government (as the Sixth Circuit [A1-19]) fails to recognize that the subject matter jurisdiction of the Court of International Trade ("CIT") is *party specific* and erroneously implies that a finding of CIT jurisdiction under 28 USC 1582(2), where *only* the Government can be the plaintiff, means that there is CIT jurisdiction in this case where Commodities is the plaintiff.

This action was first filed in the federal district court in Detroit on March 29, 1988 (A25) - *nearly one full year before any Commodities cases were filed in the CIT!* (C4-7.) Both the Detroit district court (the trial court in this case) and the Sixth Circuit had a duty *in the first instance* to determine whether or not the Detroit district court had jurisdiction.

The Detroit district court dismissed Commodities' First Amended Petition for Supplemental Relief ruling that Customs had not violated its injunction so as to give it jurisdiction and that the CIT had jurisdiction over Customs' pending bond liquidated damages claims under 28 USC 1582(2) pursuant to its ruling in *US v Commodities Export Co*, 733 F Supp 109 (CIT 1990) (D1-16, A39-52).

The Sixth Circuit vacated the Detroit district court's ruling and instructed it to transfer this case to the CIT. The Sixth Circuit accorded *res judicata* to the CIT's above ruling in *Commodities*. (A1-19.)

At no time did either the Detroit district court or the Sixth Circuit address the issue of whether or not federal district courts had subject matter jurisdiction under 28 USC 1352 and 28 USC 1355 over Customs bond liquidated damages claims where a party other than the Government was the plaintiff, although Commodities specifically raised that issue before both courts. (D9, A6-7, see discussion C7-11.)

The two principal statutes governing CIT jurisdiction are 28 USC 1581 and 28 USC 1582. Under 1582 only the Government can be plaintiff whereas under 1581 only a non-Government party can be plaintiff.[1] 1581 and 1582 are completely different. (A64-67.) *1582 jurisdiction does not constitute 1581 jurisdiction and vice versa because these statutes are (1) party specific and (2) encompass different subject matter!* The Sixth Circuit (A1-19), the Detroit district court (D1-16),

[1]28 USC 1582 is an exception to jurisdiction under 28 USC 1352 and 28 USC 1355 but 28 USC 1581 is not. Therefore, where a non-Government party is plaintiff, 28 USC 1352 and 28 USC 1355 can confer jurisdiction over bond liquidated damages claims on the federal district courts.

and the Government's Brief have assumed the opposite.[2]

Up to this case, the Government's position was that non-Government parties could obtain access to the CIT over bond liquidated damages by filing a protest under 28 USC 1581(a). See C11-14. The Government has apparently abandoned this position since it is nowhere expressed in its Brief. Instead, the Government has argued (GB6 n 5):

> The facts in this case are quite different, and may fall within Section 1581(i)'s [28 USC 1581(i)] specific grant of jurisdiction over suits arising from the substance, administration or enforcement of federal laws concerning *revenue from imports*.... (Emphasis added, see also GB8 n's 7, 9 and for text of 1581(i) see C3 and for complete text of 1581 and 1582 see A64-67.)

In its Statement, the Government described bond liquidated damages as (GB3):

> 2. a. Petitioner (like other duty-free sales enterprises) operates under a warehouse bond intended to secure compliance with regulations of the United States Customs Service (Customs) pertaining to storage and marking of merchandise, as well as certain recordkeeping procedures. See 19 U.S.C.

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[2]The Government's claim (GB8 n 8): "If the action is cognizable at all, it may be that the propriety of the CIT as the forum for this particular case has been settled, as law of the case, by the Sixth Circuit's decision...."; is preposterous. This decision was based entirely on 28 USC 1582(2) where *only the Government can and must be the plaintiff*. Commodities is the plaintiff in this case. It can never be the plaintiff in the CIT in an action brought pursuant to 28 USC 1582(2). A transfer to the CIT from the Detroit district court as ordered by the Sixth Circuit under 28 USC 1631 does not permit any court to rearrange the parties so that the Government will now be the plaintiff and Commodities the defendant so that the posture of the case will be transformed into that of a 28 USC 1582(2) case. The latter implicit suggestion is even more preposterous than the first.

1555, 1623; Pet. App. A23. *Customs is authorized to assess liquidated damages, payment of which is secured by the bond, in response to infractions by the store operator....* (Emphasis added.)

"Infractions by the store operator" is not "revenue from imports." Moreover, it is clear from this Government description that bond liquidated damages are designed to penalize the store operator. Bond liquidated damages are defined as penalties under 19 USC 1623(b)(1) and 19 CFR 113.2(a).[3] See C7-10.

In this case, Commodities is the plaintiff. It does not require a transfer to the CIT to see that the CIT has no jurisdiction over this case under 28 USC 1581, nor in particular under 28 USC 1581(i).

It is also clear that the task of ruling on the federal district court's jurisdiction has been improperly delegated to the CIT rather than to the Detroit district court and the Sixth Circuit which should have ruled on it *in the first instance*.[4]

II. There are two views of this case: (1) it is Customs' attempt to put Commodities out of business by using the bond liquidated damages assessments as a pretext; (2) it is Commodities' attempt to obtain judicial

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[3] The United States Court of Appeals for the Federal Circuit in *US v Commodities Export Co*, consolidated Case No.'s 91-1470 & 91-1482, disagreed in its ruling of August 11, 1992 without addressing this authority which was explicitly raised by Commodities. (GA8a.)

[4] The Detroit district court took no testimony but simply accepted a totally self-serving affidavit of the local district director of Customs as dispositive of the issue of the threat by Customs to put Commodities out of business. (D1-16.) Moreover, neither the Detroit district court nor the Sixth Circuit reviewed the applicability of 28 USC 1352 and 28 USC 1355 to this case. *Supra*, p 2.

review of bond liquidated damages assessments. In either, *since Commodities is the plaintiff,* the federal district courts have jurisdiction.

This case is based on Commodities' Petition for Supplemental Relief (now Amended), first filed in the Detroit district court, which in turn is based on the injunctions entered by the Detroit district court to preserve Commodities' status quo as a duty-free store making deliveries of tax- and duty-free goods *before* the border exit point. (C5-6.)

Shortly *after* Commodities opened for business on July 14, 1976, Customs changed its policy and required all duty-free stores to deliver tax- and duty-free goods at or beyond the border exit point.[5] The Detroit district court injunctions were a result of Customs' attempt to force Commodities to comply with its new policy or go out of business. (C5-7, GB3 n 2.)

The filing of Commodities' Petition for Supplemental Relief on March 29, 1988 was precipitated by Customs' threat: pay the bond liquidated damages within 30 days or go out of business.[6] There was to be no hearing of any kind. (C5-7.)

To date, Commodities has had no evidentiary hearing or trial on the merits concerning this threat.[7] See A20-38, D1-16. Viewed in this light, i.e., that the bond liquidated

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[5]Codified at 19 USC 1555(b)(3)(F)(ii). See A61.

[6]Euphemistically referred to by the Government as "administrative actions." (GB3, 8.)

[7]At trial, the CIT barred Commodities from presenting evidence on this threat which was explicitly raised in Commodities' Answer as an Affirmative Defense. Commodities raised this threat again on appeal to the Federal Circuit which ignored it. (GA1a-13a.)

damages assessments are merely a pretext or subterfuge to put Commodities out of business, there can be no question that the Detroit district court would have jurisdiction as the Sixth Circuit noted in its first opinion (A32):

> 1. *Continuing jurisdiction over previous orders of the District Court.* Commodities argues that the motions underlying this appeal are predicated on its allegation that, throughout the challenged course of conduct, Customs sought to ruin Commodities' business by bringing meritless or inflated assessments for liquidated damages in violation of the due process clause, and thus to evade the District Court's earlier order compelling it to allow Commodities to run a duty-free shop. Commodities' vice-president, also its general counsel, swore to these allegations in the petition for supplemental relief. The District Court therefore had before it proof of an evasion of a valid and binding court order, if the Court had found that this allegation was true, jurisdiction would arise from its own continuing jurisdiction, over the original dispute. We conclude that it was not enough for the District Court to reject the argument that the injunction sought here is supplemental to its prior orders without addressing these factual allegations in Commodities' petition. JA 182 n.5. We therefore remand this issue for factfinding and a ruling.

The CIT has no jurisdiction to rule on another court's injunctions.

Viewed strictly as Commodities' attempt to obtain judicial review of bond liquidated damages assessments, again the Detroit district court would have jurisdiction under 28 USC 1352 and 28 USC 1355. Since Commodities is the plaintiff, the CIT has jurisdiction under neither 28 USC 1581 in general nor 28 USC 1581(i) in particular. See, *supra*, I. and C7-14.

The Government argues (GB8-9) that if there in no jurisdiction in the CIT, then Commodities should wait to be sued by the Government in the CIT under 28 USC 1582(2).

This misses the point of this case which is that Commodities has a Constitutional due process right to equal access to a judicial forum *in its own right*.[8] This point was clearly grasped by the Sixth Circuit in its first opinion (A32-35) and even by the Federal Circuit (GA11a n 3).[9]

In the CIT and the Federal Circuit, the Government maintained that this case was different from the CIT case. See A45. In the Supreme Court (GB6-7), the Sixth Circuit (A1-19), and the Detroit district court (D1-16), it maintained that they were the same to support the concept of *res judicata*. A finding of *res judicata* based solely on 28 USC 1582(2) is limited to just that: a case in which the Government is the plaintiff. It is not extendable to the whole gamut of CIT jurisdiction.

III. On August 11, 1992 the Federal Circuit upheld the CIT's jurisdictional ruling in *Commodities, supra.* (GA1a-13a.) Commodities respectfully disagrees because that decision fails either to analyze or recognize how duty-free stores actually operate which is exclusively in *export.*

Duty-free stores temporarily store both domestic and

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[8]Had Commodities not filed its Petition for Supplemental Relief in the Detroit district court on March 29, 1988, it would have been forced out of business by Customs in 1988.

[9]The Federal Circuit stated (GA11a n 3):

> The Supreme Court has referred in dicta to 28 U.S.C. § 2415 as "a statute aimed at equalizing the litigative opportunities between the Government and private parties." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 (1967). The Supreme Court noted that "[t]he congressional intent to 'put the Government on a parity with those private litigants who may sue' and 'to equalize the position of litigants' is sufficiently evident." *Id.* at 521 n.14 (citations omitted)....

foreign goods in their bonded warehouses pending their immediate exportation from the United States in the possession of travelers departing the United States who buy the goods from the duty-free store.

The foregoing is a constant in the duty-free industry which represents the whole "transaction" which must be examined for purposes of determining "import transaction" under 28 USC 1582(2). See A67. The Federal Circuit only examined the first half (GA5a-7a) which in essence holds that foreign goods are imported into the United States the instant they cross the border.[10]

On December 17, 1931, in *Stone & Downer et al v US*, 19 CCPA 259, 264 (1931), *cert. den.*, 287 US 619 (1932), the United States Court of Customs and Patent Appeals stated a fundamental principle of law specifically applicable to Customs bonded warehouses, to wit: there is no importation until the goods are withdrawn and injected into the US stream of commerce. See C15. The Federal Circuit (GA6a) erroneously restricted *Stone* to "the timing of duty assess-

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[10]This is simply untrue: A Danish tourist arrives at Dulles International Airport with a new Nikon camera purchased in Copenhagen to take snapshots of his two week vacation in the US after which he will return to Denmark with his pictures and Nikon. Is the Nikon imported?

A train loaded with Canadian goods goes from Toronto to Mexico City via the US. Are the Canadian goods imported?

The zoo in Toledo, Ohio, hosts a panda bear exhibit during the summer for which it charges admission after which the pandas are returned to China. Were the pandas imported?

A foreign museum sends its art works on a tour of the United States after which the art is returned to the foreign museum. Were the art works imported?

The answer to all of these questions is "No."

ments." There is no support in *Stone* for this restriction. Indeed, not even the CIT took this position. See A47-48.

The Federal Circuit conducted no factual analysis of the workings of duty-free stores as it was specifically asked to do. Instead, it accepted the words "importation" and "imported" as used in 19 USC 1557(a) and 19 USC 1555(a), respectively, as dispositive of the issue of whether or not goods in bonded warehouses are "imported" without asking "Why." See GA5a. Apparently, this means that the Jack Daniels in Commodities' bonded warehouse is also "imported." The Federal Circuit also did not note that 19 USC 1555(a) is subject to 19 USC 1555(b), the only statute that specifically deals with duty-free sales enterprises and which says nothing about "importation" but rather emphasizes the export nature of duty-free stores. See A58-63. Moreover, the language on which the Federal Circuit relied in 19 USC 1555(a) and 19 USC 1557(a) went into effect on June 17, 1930 - a year and a half before *Stone* and some thirty years before the first duty-free store appeared on the American scene. At that time all Customs bonded warehouses were used to expedite and facilitate the importation of goods into the United States, i.e., the injection of foreign goods into the American stream of commerce.

Based on the faulty premise that the goods in Commodities' bonded warehouse are "imported," the Federal Circuit ruled that Commodities' bond relates to "the importation of merchandise" as required by 28 USC 1582(2) because (1) "the bond's terms deal with Commodities' documentation and manipulation of imported merchandise in its warehouse" and (2) "the bond also ensures payment of duties on imported merchandise in the event those duties become payable." See GA7a. Commodities' bond says nothing about "importation" as the CIT duly noted (A51). Lastly, the Federal Circuit did not recognize that all the liquor in Commodities' warehouse is subject to 26 USC 5214(a)(9) which mandates storage for

export only under bonds prescribed by the Secretary of the Treasury.

IV. The Supreme Court has not defined "importation," "imported," or "import transaction." It may now be necessary to do so. The Cold War is over. The United States is now in an economic war: it is about to implement a number of trade agreements. In one form or another these terms will continue to return to this Court.

CONCLUSION

Commodities' Petition for Writ of Certiorari should be granted.

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